IN THE

Supreme Court of the United States

APR 23 1958
JOHN T. FEY, Clerk

OCTOBER TERM, 1957 — No. 947

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

vs.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA AND THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, Deceased,

Appellees

On appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

LOIS G. FORER
Deputy Attorney General
THOMAS D. McBRIDE
Attorney General
State Capitol, Harrisburg, Pa.
Attorneys for the Commonwealth of Pennsylvania

ABRAHAM L. FREEDMAN
Special Counsel
12th fl. Packard Bldg., Phila. 2, Pa.
DAVID E. PINSKY
JACOB J. SIEGAL
Assistant City Solicitors
DAVID BERGER
City Solicitor
703 City Hall Annex, Phila. 7, Pa.
Attorneys for the City of Philadelphia, Richardson Dilworth, Mayor of the City of Philadelphia, and the Philadelphia Commission on Human Relations

WILLIAM T. COLEMAN, JR.
2635 Fidelity-Phila. Trust Bldg. Philadelphia 9, Pa.
RAYMOND PACE ALEXANDER
40 South 19th St., Phila. 3, Pa.
LOUIS H. POLLAK
127 Wall Street, New Haven, Conn.
Attorneys for Appellants William Ashe Foust and Robert Felder

INDEX

	Page
Opinions Delivered in the Courts Below	1
Statement of the Grounds on Which Jurisdiction Is Invoked	4
Statutes Involved	7
Questions Presented	8
Statement of the Case	12
I. The Background	12
II. The Current Controversy	18
The Federal Questions Are Substantial and Are of Great Public Importance	23
Conclusion	37
Appendices:	
Appendix A—Opinions and Judgment of the Supreme Court of Pennsylvania	39
Opinion by Chief Justice Jones	39
Dissenting Opinion by Justice Musmanno	55
Appendix B—Text of Statutes Involved	83
Pennsylvania Act of June 30, 1869, P.L. 1276	83
Pennsylvania Act of March 24, 1832, P.L. 176	86
Pennsylvania Act of April 4, 1832, P.L. 275	87
Pennsylvania Act of February 27, 1847, P.L. 178	87
Pennsylvania Act of April 20, 1853, P.L. 624	90
Pennsylvania Act of May 23, 1887, P.L. 168	91
Pennsylvania Act of April 18, 1949, P. L. 512	91
Appendix C — Citations of the Principal Ordinances of the City of Philadelphia Relating to the Girard Estate and Girard College	93

TABLE OF CITATIONS

Cases: Page

Allegheny Corp. v. Breswick, —— U. S. ——, 2 L. Ed. 2d 374 (1958) 36

American Communications Ass'n., C.I.O. v. Douds, 339 U. S. 382 24

American Houses, Inc. v. Schneider, 211 F. 2d 881 (3rd Cir., 1954) 31

Atchison, Topeka & S. F. R. Co. v. Public Utilities Commission, 346 U. S. 346 6

Barrows v. Jackson, 346 U. S. 249 ..... 23, 25, 26, 29

Black v. Cutter Laboratory, 351 U. S. 292 ..... n25

Ex Parte Bransford, 310 U. S. 354 ..... n5

Brotherhood of Railway Trainmen v. Howard, 343 U. S. 768 32

Brown v. Board of Education, 347 U. S. 483 ..... 9, 12, 20, 35

Burns Estate, 2 D. & C. 2d 579 (Orph. Ct., Phila., 1955) 15

Charleston Federal Savings & Loan Assn. v. Alderson, 324 U. S. 182 6

City of Greensboro v. Simkins, 246 F. 2d 425 30

Clearfield Trust Co. v. United States, 318 U. S. 363 31

Comm. v. Rush, 14 Pa. 186 (1850) n31

Craig's Estate, 356 Pa. 564, 52 A. 2d 650 (1947) n29

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289-290 5

Dawson v. Mayor of Baltimore, 350 U. S. 877 30

Frazier v. Board of Trustees of University of North Carolina, 134 F. Supp. 589 (M.D.N.C. 1955) aff'd. 350 U. S. 979 36

TABLE OF CITATIONS—*Continued*

Cases: Page

Gandolfo v. Hartman, 49 Fed. 181 (C.C.S.D., Calif., 1892) 24

Garrison's Estate, 391 Pa. 232 19

Girard Estate, 4 D. & C. 2d 671 (Phila. Orph. Ct. 1955) 18

Hamilton v. University of California, 293 U. S. 245 6

Hayburn's Case, 2 U. S. 409 (1792) 36

Hoffman v. Pittsburgh, 365 Pa. 386 (1950) n31

Holmes v. City of Atlanta, 350 U. S. 879 30

Hurd v. Hodge, 334 U. S. 24 31

Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (4th Cir., 1944), cert. denied, 326 U. S. 721 32

Lawrence v. Hancock, 76 F. Supp. 1004 ..... 30, 34

Mangione, Minor, 4 Fiduc. Rep. 517 (Pa. 1954) 15, 18

Marsh v. Alabama, 326 U. S. 501 ..... n29, 32

May v. Anderson, 345 U. S. 528 7

McCollum v. Board of Education, 333 U. S. 203 5

McLauren v. Oklahoma, 339 U. S. 637 ..... n5

Muir v. Louisville Park Theatrical Assn., 347 U. S. 971, vacating 202 F. 2d 275 30

Pennsylvania v. Board of Directors of City Trusts, 353 U. S. 230 ..... 2, 7, 9, 18, 23, 24, 26, 30

Philadelphia v. Fox, 64 Pa. 169 (1870) 16

Pruner's Estate, 390 Pa. 529 (1957) 19, n29

Public Utilities Commission for the District Columbia v. Pollak, 343 U. S. 451 32

TABLE OF CITATIONS—*Continued*

Cases:	Page
Railway Employees' Dept. A.F.L. v. Hanson, 351 U. S. 225	24, 27, 28
Rice v. Elmore, 165 F. 2d 387 (C. A. 4th, 1947), cert. denied, 333 U. S. 875	25, 28, 34
Rice v. Sioux City Cemetery, 348 U. S. 880	n25
Shelley v. Kraemer, 334 U. S. 1	23, 24, 25, 26
Sipuel v. Board of Regents, 332 U. S. 631	36
Smith v. Allright, 321 U. S. 649	25
Soohan v. Philadelphia, 33 Pa. 9 (1859)	13, n18, n26
Steele v. Louisville and Nashville R. R. Co., 323 U. S. 192	32
Sweatt v. Painter, 339 U. S. 29	35
Tate v. Department of Conservation and Development, 133 F. Supp. 53, 61 affirmed 231 F. 2d 615	30
Terry v. Adams, 345 U. S. 461 (1953)	25, 28, 33-34, 35
Union National Bank v. Lamb, 337 U. S. 38	7
United States v. Burnison, 339 U. S. 87	31
Vidal v. Girard's Executors, 2 How. 127, 190-191 (1844)	14
Wisconsin v. J. C. Penney Co., 311 U. S. 435	36
United States Constitution:	
Article VI, Clause 2	7
Fourteenth Amendment	7 et seq.
United States Statutes:	
28 U.S.C. §1257(2)	4, 7
28 U.S.C. §2103	7

Pennsylvania Statutes: Page

1832, March 24, P.L. 176 ..... 7, 13, 14

1832, April 4, P.L. 275 ..... 7, 13

1847, February 27, P.L. 178 ..... 7, 15, 34

1853, April 20, P.L. 624 ..... 7, 15, 34

1869, June 30, P.L. 1276 ..... 7-8, 9, 16, 17

1887, May 23, P.L. 168 8

Pennsylvania Fiduciaries Act of April 18, 1949, P.L. 512 ..... 4 et seq.

Miscellaneous Authorities:

Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 Mich. L. Rev. 633 ..... n29

Columbia Law Review, vol. 56, p. 285 (1956)—"City's Operation of Schools under Discriminatory Will Does Not Violate Fourteenth Amendment" 35

Dillon, Municipal Corporations, Vol. 3 (5th ed.) §1102. n31

Fairman, *Mr. Justice Bradley*, in Dunham & Kurland, *Mr. Justice* (1956), p. 91 35

Dunham & Kurland, *Mr. Justice* (1956), p. 91 35

Robertson & Kurland, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland, 3rd ed. 1951), pp. 11, 21, 23-24 6

Shanks, *'State Action' and the Girard Estate Case*, 105 U. of P. L. Rev. 213, 226 (1956) n29

56 Yale L.J. 574, *Evasion of Supreme Court Mandates by State Courts* 36

66 Yale L.J. 979, 984 Fn. 19 37

Ordinances of the City of Philadelphia:

1833, March 21 15

1836, July 14 15

1841, January 28 16

1848, November 9 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ————

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

vs.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA AND THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, Deceased,

Appellees

On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

OPINIONS DELIVERED IN THE COURTS BELOW

This proceeding, now before this Court for the second time, was initiated in the Orphans' Court of Philadelphia County by appellants William Ashe Foust and Robert Felder, who sought admission to Girard College in Philadel-

phia. The requests for admission were supported by the Mayor and the Commission on Human Relations of the City of Philadelphia, and the Attorney General of the Commonwealth of Pennsylvania. The Orphans' Court in 1955, over federal constitutional objections, held that the Board of Directors of City Trusts, charged with administering Girard College on behalf of the City of Philadelphia, as trustee under the will of Stephen Girard, rightly refused admission to Negro appellants solely because they are Negroes; and in accordance with this conclusion Negro appellants' complaint was dismissed. 4 D. & C. 2d 671 (Orph. Ct. Phila., 1955).

The first opinion of the Supreme Court of Pennsylvania sustaining Negro appellants' exclusion (Musmanno, J., dissenting) is reported at 386 Pa. 548, 127 A. 2d, 287 (1956).

On April 29, 1957, this Court, in a *per curiam* opinion, held that the Board of Directors of City Trusts' action in excluding Negro appellants from Girard College because of their race contravened Negro appellants' rights under the Fourteenth Amendment; and this Court accordingly remanded the case for proceedings not inconsistent with its opinion. *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230.

On remand, the Supreme Court of Pennsylvania in a *per curiam* order (7 Fiduc. Rep. 555 (Pa.)) returned the case to the Orphans' Court of Philadelphia County for proceedings not inconsistent with this Court's opinion. Two members of the Court filed elaborate opinions dissenting for opposite reasons, neither of which was reported, but appear in the Joint Record of Appellants (J.R.) before the court below at the indicated pages. Mr. Justice Bell would have remanded the case with instructions to the Orphans' Court to remove the Board of City Trusts as trustee and substitute trustees none of whom are officers or employees of the State or City (J.R. 45a). Mr. Justice Musmanno believed the opinion of this Court required the

court below to remand with directions to admit the Negro appellants to the school (J.R. 49a).

Without any "further proceedings" as directed by this Court, and without notice or hearing, and without the request of any party to the litigation, by amendment or otherwise, the Orphans' Court of Philadelphia County on its own motion ordered the removal of the Board of Directors of City Trusts of the City of Philadelphia as trustee under the will of Stephen Girard; this removal, therefore, was not only from the trust for Girard College, but from all of the trusts created by the will. The Court ordered the substitution of a group of thirteen individuals, six of whom are members of the Board of Directors of City Trusts. The individual trustees have been ordered to administer not only Girard College, but the entire estate, conditioned upon their resignation from the said Board of City Trusts. In the same order, the Orphans' Court decreed that "the petitions of William Ashe Foust and Robert Felde for admission to Girard College are dismissed." Shortly thereafter the Orphans' Court denied rehearing. Its opinions and orders are reported at 7 Fiduc. Rep. (Pa.) 555, 606-610.

On January 24, 1958, the Supreme Court of Pennsylvania (by a 4 to 1 vote, Mr. Justice Musmanno dissenting) affirmed the order dismissing the Board of City Trusts as trustee, substituting individual trustees and excluding Negro appellants. This decision, from which the instant appeal is prosecuted, is reported at 391 Pa. 434 and the opinions are annexed hereto as Appendix A, *infra*, p. 39 et seq.

On February 12, 1958, the Supreme Court of Pennsylvania denied a timely petition for rehearing, but rendered no further opinion.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment herein sought to be reviewed is one in which the Supreme Court of Pennsylvania, for the second time, has sustained Negro appellants' exclusion from Girard College solely because they are Negroes.

The opinion and judgment of the Supreme Court of Pennsylvania were handed down on January 24, 1958. A timely petition for rehearing was denied on February 12, 1958, and notice of appeal to this Court was filed in the court below on April 10, 1958.

The appeal jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2), which provides for a review by appeal of final judgments of the highest state court in which decision could be had sustaining the validity of a state statute against a claim of repugnancy to the Constitution of the United States. The state statute sustained by the Supreme Court of Pennsylvania in the present proceeding is the Fiduciaries Act of April 18, 1949. P. L. 512, Sec. 831(5), the relevant provisions of which are set out verbatim in Appendix B, *infra*, pp. 91-92. That statute in pertinent part authorizes the Orphans' Court to remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." It is this statute which the Supreme Court of Pennsylvania referred to as "the presently applicable statute" (see Appendix A, *infra*, p. 47) in that it was held to permit the removal by the Orphans' Court of the City of Philadelphia's Board of Directors of City Trusts, the device which the court below concluded was the necessary, but sole and sufficient, prerequisite to the exclusion of Negro appellants from Girard College merely because of their race.

As the Supreme Court of Pennsylvania construed the Fiduciaries Act of April 18, 1949 to authorize the racially discriminatory order of the Orphans' Court, the validity of that authorizing statute is drawn directly into question.

From the point of view of appeal jurisdiction, the instant case is identical in posture with *McCollum v. Board of Education*, 333 U. S. 203. There appellees moved to dismiss on the ground, *inter alia*, that the validity of a state statute had not been drawn into question. This Court observed that appellees' contention "rests on the admitted fact that the challenged program of religious instruction was not expressly authorized by statute." This Court nevertheless held that its mandatory jurisdiction had been properly invoked inasmuch as:

> ". . . the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the Board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 U.S.C., Sec. 344 (a)." 333 U. S. at p. 206.

What was made articulate in the *McCollum* case has been and remains the settled rule of this Court: [1] *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289-290;

---

[1] The question of mandatory appeal jurisdiction under Section 1257(2) of Title 28, the section here applicable, should be distinguished from the question posed by Sections 1253 and 2281 of Title 28, dealing with three-judge court proceedings and the right of direct appeal to this Court from a decision of a federal district court especially so constituted. In the three-judge court situation some of the cases have held that three-judge court proceedings are appropriate and the right of direct appeal to this Court exists only when the validity of the statute on its face is attacked. See, *e.g.*, *Ex Parte Bransford*, 310 U. S. 354, 361. In the cases involving appeal jurisdiction under Section 1257(2), however, all decisions of this Court are uniformly to the effect that an attack on the validity of the statute as applied brings the case within the mandatory appeal jurisdiction set forth in Section 1257(2) of Title 28. *McCollum v. Board of Education*, 333 U. S. 203. In addition, the more recent cases of this Court have held that even under Sections 1253 and 2281 this Court will allow an appeal where only the statute as applied is being attacked. See *e.g. McLauren v. Oklahoma*, 339 U. S. 637.

Hamilton v. University of California, 293 U. S. 245, 258; *Atchison, Topeka & S. F. R. Co. v. Public Utilities Commission*, 346 U. S. 346-348; See ROBERTSON & KURLAND, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland 3d, Ed. 1951, pp. 11, 21). The basis for the rule is, of course, that:

> "In cases where a state court has held a state statute applicable to a particular set of facts, against the specific contention that if applied to such facts the statute is invalid on federal grounds, the Supreme Court has exercised jurisdiction on appeal, the theory being that the state court has construed and applied the statute as though it had in specific terms been made applicable to the precise facts of the particular case, and has thus sustained its validity as so construed and applied." ROBERTSON & KURLAND, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (Wolfson & Kurland, 3rd Ed., 1951) pp. 23-24.

It is, of course, essential to support mandatory appeal jurisdiction in such circumstances that there be "an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S. 182, 185. In the instant case appellants Foust and Felder, as well as the City of Philadelphia and the Commonwealth of Pennsylvania, plainly pointed out in their Statements of Questions Involved and their briefs before the Supreme Court of Pennsylvania "that if the Fiduciaries Act of 1917 or any other statute, including the Fiduciaries Act of 1949, is interpreted as authorizing or requiring the City's removal (i.e., the removal of the Board of Directors of City Trusts acting on behalf of the City of Philadelphia) because it would have to admit Negroes to Girard College, serious problems are raised as to the statute's constitutionality. *Ill. ex rel., McCollum v. Board of Education*, 333 U. S. 203 (1948)." See *Brief for*

appellants Foust and Felder, In re Estate of Stephen Girard (Sup. Ct., Pa. Jan. Term, 1958), p. 26; *Brief for Commonwealth of Pennsylvania*, pp. 12, 24; *Brief for City of Philadelphia*, pp. 6-10, 32. Appellants had also challenged the validity of the Fiduciaries Act of 1949, as thus applied in the Statement of Questions Involved. See, for example, questions 2 and 3 of "*Statement of Questions Involved*," at page 1 of the brief for Foust and Felder. All appellants again raised this question in a joint petition for reargument (See Certified Record.) The instant case, therefore, falls clearly within this Court's jurisdiction on appeal under 28 U.S.C., Sec. 1257(2), in consonance with the principles enunciated above.

In the alternative, appellants submit that this case beyond question falls within this Court's jurisdiction on certiorari under 28 U.S.C., Sec. 1257(3); and pursuant to 28 U.S.C., Sec. 2103, this Court is urged to entertain the instant case on certiorari if it is felt that the case is not properly here on appeal. See *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230; *May v. Anderson*, 345 U. S. 528; *Union National Bank v. Lamb*, 337 U. S. 38, 39-40.

STATUTES INVOLVED

As already noted, the statute asserted to be invalid as applied is the Pennsylvania Fiduciaries Act of April 18, 1949, P. L. 512, Sec. 331(5), 20 PURD. STAT. Sec. 320.331, the relevant provisions of which are printed in Appendix B, *infra*, p. 91, *et seq.*

The other statutory provisions involved are the following Acts of the Pennsylvania Legislature, pertinent portions of which are printed in Appendix B, *infra*, p. 83, *et seq.*: Act of March 24, 1832, P. L. 176; Act of April 4, 1832, P. L. 275; Act of February 27, 1847, P. L. 178; Act of April 20, 1853, P. L. 624; Act of June 30, 1869, P. L.

1276; and Act of May 23, 1887, P. L. 168; and pertinent ordinances of the City of Philadelphia set forth in Appendix C, *infra*, p. 93, *et seq.* These statutes and ordinances comprise the vast legislative apparatus created by the Commonwealth of Pennsylvania and the City of Philadelphia implementing the will of Stephen Girard to enable the City to establish and maintain Girard College.

The constitutional provisions involved are Article VI, Clause 2 of the Constitution of the United States, and the Fourteenth Amendment.

QUESTIONS PRESENTED.

By his will, probated in 1831, Stephen Girard, "impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations to which, through poverty and ignorance they are exposed," left most of his huge fortune to "the Mayor, Aldermen and citizens of Philadelphia" to build, establish and maintain Girard College. The will provides that if the City of Philadelphia defaults as trustee, the estate, save for certain properties, shall pass to the Commonwealth of Pennsylvania, and in default thereof, to the Government of the United States.[2] The City was enabled to accept the gift in accordance with its terms only by reason of state legislative enactments, all of which are still in effect. From 1832 to date the City of Philadelphia, first through its City Council and then through the Board of Directors of City Trusts, has acted as trustee and administered the entire estate, including Girard College which was opened in 1848.

---

[2] Since the gift is to the "Mayor, Aldermen and citizens of Philadelphia" it is clear that upon the default of the City, the Commonwealth, and then the United States, as successor legatees would substitute as trustee of the entire Girard Estate, including the College.

This administration has been made possible only by a substantial number of implementing state statutes and municipal ordinances.

This litigation arises out of the refusal of the Board of Directors of City Trusts, and now the refusal of the Orphans' Court of Philadelphia, the so-called substituted trustees and the Supreme Court of Pennsylvania, to admit to Girard College Negro poor, male, orphans **who qualify in every respect for admission except that they are not white.**

On April 29, 1957, this Court held that the Board of Directors of City Trusts, the City agency created by the Pennsylvania Act of June 30, 1869, P. L. 1276, to administer Girard College, violated the rights of Negro appellants guaranteed them by the Fourteenth Amendment when it rejected their application for admission solely because of their race, even though Girard's will provided that the school was for "poor, male, white orphan children." *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230. This Court also held that the admission policies of the College were subject to this Court's ruling in *Brown v. Board of Education*, 347 U. S. 483. The Orphans' Court of Philadelphia county on remand, without hearing, notice or request of any party to the litigation, on its own motion, and in a proceeding whose only purpose was to attain an order requiring the admission of certain Negroes to Girard College, removed the City of Philadelphia as trustee of the entire Girard Estate and appointed a "private" group of thirteen trustees, six of whom (the majority of the old Board) were appointed upon the express condition and order that they resign from their governmental positions as members of the Board of Directors of City Trusts. The Orphans' Court then dismissed the petition of the Negro appellants for admission to Girard College solely on the grounds of their race. On appeal to the Supreme Court of Pennsylvania, counsel for the substituted trustees appeared although no petition to intervene had been filed. Counsel

for the Board of City Trusts entered his appearance as appellee, but failed to appear at argument to protest the Board's removal. The Supreme Court of Pennsylvania held that while there exists the general common law power, the jurisdiction to remove the public trustees was conferred upon the Orphans' Court of Philadelphia County by Section 331(5) of the Fiduciaries Act of April 18, 1949, P. L. 512, 20 Purd. Stat. §320.331, which provides that the court can remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." The court below affirmed the orders.

The questions presented are:

1. Whether Section 331(5) of the Fiduciaries Act of April 18, 1949, P. L. 512, 20 PURD. STAT. §320.331, violates the Fourteenth Amendment to the Constitution of the United States in so far as it authorizes or requires the judicial ouster of public trustees named in Girard's Will and authorized by state statute, when such judicial ouster is for the express and sole purpose of continuing the exclusion of Negro appellants from Girard College solely because of their race.

2. Whether the exercise of state judicial power to remove a trustee violates the Fourteenth Amendment when the expressed and sole purpose and effect of its exercise is to deprive Negro appellants of their previously adjudicated constitutional right to attend Girard College.

3. Whether a state, consistently with the Fourteenth Amendment, can convert a publicly operated school into a "private" school solely for the express purpose of denying Negroes their previously adjudicated constitutional right to attend the school prior to the conversion.

4. Whether, despite the removal of a municipal agency as trustee, Girard College is not still in constitutional contemplation a public institution whose admissions policies

are subject to the limitations of the Fourteenth Amendment:

(a) Because there remain in force so many other substantial forms of governmental supervision, subsidy and control; particularly, the requirement that the City of Philadelphia remain as guardian for all students at Girard College;

(b) Because the "new" trustees include the majority of the appointed members of the Board;

(c) Because the "new trustees" have been ordered to administer not only Girard College, but all the other trusts established for the public welfare by Girard's Will;

(d) Because Girard College cannot in any event escape the century of history in which governmental nurture of every kind has translated Stephen Girard's testamentary desires into a great public institution and increased the estate from $2,000,000 to $100,000,000.

5. Whether the action of the Pennsylvania courts on remand from this Court was inconsistent with the mandate of this Court.

6. Whether the appointment of "private" trustees not contemplated by the will does not impair the rights of the Government of the United States which was named ultimate successor trustee by Stephen Girard.

STATEMENT OF THE CASE

This appeal grows out of the fact that the Orphans' Court of Philadelphia County acting under §331(5) of the Pennsylvania Fiduciaries Act of April 18, 1949, P. L. 512, 20 Purd. Stat. §320.331, without notice, hearing, or argument or the request of any party to the litigation, removed the Philadelphia governmental body as trustee and administrator of Girard College solely because that public body was under a constitutional mandate to admit Negroes to Girard College as a result of this Court's holding that its decision in *Brown v. Board of Education*, 347 U. S. 483, was applicable to Girard College. So-called private trustees were appointed solely so that Negroes could be excluded from Girard College.

I. THE BACKGROUND

Stephen Girard died on December 28, 1831. The bulk of his vast estate was left to the City of Philadelphia for various municipal purposes, the most important of these being the establishment of Girard College. Article XXI of the Will named the City of Philadelphia trustee of $2,000,000 to establish and operate a school for "poor male, white orphan children" plus the residue of Girard's estate:

1. For the improvement and maintenance of Girard College; any excess to be used

2. For the provision of a better police force for the City;

3. To enable the City to improve City property and the general appearance of the City.

Girard bequeathed an additional $300,000 to the Commonwealth of Pennsylvania on the proviso that it enact within one year after his death the necessary enabling legislation to carry out the terms of his Will. (Article XXIII). Girard provided that if the City of Philadelphia

failed to establish Girard College or defaulted in the administration of the estate, the residue of his estate, except for the net income from Philadelphia real estate which was to be reserved for the College, was to pass to the Commonwealth, and in default thereof, of the United States (Art. XXIV).

Article XXI, §2 of the Will provides for the organization, staff and composition of the student body of the College. Before an orphan may be admitted to the College there must first be furnished to the City of Philadelphia a release by his guardian (*id.*, §5). Orphan boys born in the City of Philadelphia are given first priority among the applicants (*id.*, §6). The City of Philadelphia is given the power to bind out the orphans after their graduation from College to suitable occupations and manufactures (*id.*, §9). Further, this Article (1) declared that Girard left wide discretion to the City government of Philadelphia in relation to the management, organization and administration of Girard College and (2) expressed the belief that the extent of his gift will make the people of Philadelphia observe special care in the selection of their public officials.

To comply with Girard's requirements and to make the Commonwealth eligible for the $300,000, the Pennsylvania Legislature immediately enacted the Act of March 24, 1832, P. L. 176, and the Act of April 4, 1832, P. L. 275, which, in the words of the Orphans' Court in this case, "implements the will and authorizes the City to do everything necessary to accept the property and to serve as trustee in order to fulfill Girard's purposes." 4 D. & C. 2d 671, 677 (Orph. Ct., Phila., 1956); *Soohan v. Philadelphia*, 33 Pa. 9, 23 (1859).

The former Act directs the constituted authorities of Philadelphia to carry Girard's Will into effect, and incorporated into State law the provisions of Articles XXII, XXIII and XXIV of the Will which required such legislative implementation. The preamble to this Act declares:

". . . Now, for the purpose of enabling the Mayor, Aldermen and Citizens of Philadelphia, aforesaid, to effect the improvements contemplated by the said Testator, and to execute in all other respects the trusts created by his will, to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws."

Section 10 of this Act is a general grant of authority to the City to "do and execute all such acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will . . .".

The Act of March 24, 1832, implemented the trust for the College as well as the trusts for the improvement of the City. Section 2 provides that no street or road shall be laid out or passed through the College property unless it is recommended by the trustees of the College. In this way the Legislature implemented the provision in Article XXI of the Will requiring that the entire College premises be enclosed with a solid ten feet high wall and guarded with iron on the top so as to prevent persons from getting over. This implementation by the Legislature in the Act of March 24, 1832, of Girard's Will in relation to the College was pointed out and emphasized by this Court in *Vidal v. Girard's Executors*, 2 How. 127, 190-191 (1844).

The second Act provides:

"The Select and Common Council of the City of Philadelphia, shall be and they are hereby authorized to provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." (App. B, *infra*, p. 87).

Other legislation was enacted,[3] all of which has been recognized repeatedly by the courts of Pennsylvania as the foundation and support of what Girard wanted, or, in the words of the court below, "in aid of certain provisions of the Will." 386 Pa. at p. 554, Fn. 2. For example, Article XXI, par. 5 of Girard's Will stipulated that no student could be admitted to the College until the legislature enacted a statute giving to the Mayor of the City of Philadelphia the power and duty to prevent relatives from interfering with, or withdrawing, any orphans from the College. The Legislature so provided, just before the College first opened. Act of February 27, 1847, P. L. 178. This Act is "a special Act giving legislative sanction to Clause XXI, par. 5 of Girard's Will. It was passed to implement the Will." *Mangione, Minor*, 4 Fiduc. Rep. 517, 521 (Pa. 1954).

The same Act gave legislative sanction to paragraph 9 of Article XXI of Girard's Will, which required that students who reached 18 years of age were to be bound out by the City of Philadelphia to suitable occupations until they reached the age of 21. *Burns Estate*, 2 D. & C. 2d 579, 580 (Orph. Ct., Phila., 1955). It also gave authority to the City of Philadelphia to undertake this duty. Still another Act had to be passed to give the City authority and power to bind out the orphans as apprentices as required by the Will. Act of April 20, 1853, P. L. 624 (See App. B, *infra*, p. 90).

There were in addition a host of municipal ordinances, all stemming from the grant of power from the State, necessary to effectuate the Will. On March 21, 1833, for example, the Philadelphia City Council passed an ordinance providing for the construction of the school, naming it the Girard College for Orphans,[4] and requiring all building plans to be approved by Council. On July 14, 1836, an ordinance was adopted making provision for the purchase of

---

[3] See App. B, *infra*, pp. 83-91.

[4] The City, not the Will, named the College.

books and paraphernalia. On January 28, 1841, Council ordained that all contracts entered into by the College had to be validated by Council. Committees were appointed by Council to handle the administration of the College.

The cornerstone of Girard College was laid on July 14, 1832. It was officially opened for student occupation on January 1, 1848. On November 9, 1848, Council appointed a visitation committee to visit the College once a month and report on its findings to Council. Indeed, between September 15, 1832, and December 18, 1869, the Council enacted more than forty different ordinances devoted exclusively to the Girard College. See App. C, *infra*, p. 93; dissenting opinion, App. A, *infra*, pp. 58, 74.

Until 1869 the College was under the direct charge of City Council and its various Committees. As a result of the increased duties required to manage the College and of dissatisfaction with the manner in which the College was managed by City Council, the management and direction of Girard College was transferred by the State Legislature to a Board of Directors of City Trusts of the City of Philadelphia, created by the Act of June 30, 1869, P. L. 1276, 53 Purd. Stat. §16365. This change was held by the Supreme Court of Pennsylvania to be merely a reallocation of city functions from one city agency to another city agency.[5] *Philadelphia v. Fox*, 64 Pa. 169 (1870). These directors "in the discharge of their duties, and within the scope of their powers aforesaid, shall be considered agents

[5] The fact that the Board was appointed and not elected, as was City Council, did not invalidate the Act, although Girard's Will expressed the belief that his fellow citizens would "observe and evince especial care" in the selection of their mayor and councilmen in view of the size of his estate which they would administer. Since the Legislature could repeal the City's charter, it could amend it by reallocating functions from elected to appointed officials, *Philadelphia v. Fox, supra*. In this way, the legislation superseded certain provisions of the will. In like manner, appellants urge that the Fourteenth Amendment supersedes the provision of the will restricting admission to "white" boys.

or officers of said city." (§6 of the Act of June 30, 1869, App. B, *infra*, p. 83. It is, moreover, the statutory duty of the directors "for and in the name of the said City, to do, perform, and discharge, all and singular, whatever acts and duties are or from time to time may become proper or necessary to be done by the said City in discharge of said trust. . . ."

The Mayor of the City and the President of City Council are designated by this statute as members of the Board. 53 Purd. Stat. §16365. The other twelve members are appointed by the judges of the Courts of Common Pleas of Philadelphia County. 53 Purd. Stat. §16366.[6] The City Controller, an elected official, is required by law to audit the accounts of the College each year (Philadelphia Home Rule Charter, Section 6-400(c)), and the Board is required by **the Will and by Statute** to report annually to the City Council and to the State Legislature. By statute it is also required to report to the Courts of Common Pleas of Philadelphia. 53 Purd. Stat. §16368. The City Treasurer is required by law to be the Treasurer of Girard College. 53 Purd. Stat. §16367.

The Board served without compensation, and the College enjoys a tax exemption equivalent to $555,700 per year (T. 474, 662).[7] When Girard College opened on January 1, 1848, all of the $2,000,000 had been expended. By the stewardship of the City of Philadelphia, however, the estate of $2,000,000 in 1832 has grown to $98,000,000 in 1955 with an annual income of $2,211,000 (T. 480).

The impressive array of State legislation and official action well supports this Court's statement, when this case

---

[6] This method of appointment is the same as is used for the Board of Education which controls and operates the public school system in Philadelphia and the Board of Revision of Taxes which fixes the assessment for all real estate in Philadelphia for city and school taxes.

[7] "T" references are to the typewritten transcription.

was here before, that "the provisions of the Will were carried out by the state and city." 353 U. S. at p. 231.

Girard College is today, and has been since its inception, an institution of high educational standards, devoted to the education and training of orphan boys. Its physical "present capacity is 1,772 [students] with a potential of 2,012," *Mangiowe, Minor*, 4 Fiduc. R. 517, 520 (Pa. 1954), but at the time of hearing there were only 1,300 students in the school. Located in the heart of Philadelphia in what is now a substantially Negro area, this institution, administered by the City of Philadelphia for 127 years, excludes Negroes.

II. THE CURRENT CONTROVERSY

(How the Federal Questions are Presented)

In February, 1954, Negro appellants, Foust and Felder, applied for admission to Girard College. In March, 1954, the Board of Directors of City Trusts of the City of Philadelphia adopted a resolution rejecting them for admission. Each Negro appellant received a letter from the Secretary of the Board, on official stationery headed "The City of Philadelphia," setting forth the Board's resolution rejecting him. It was admitted by the Board and by all the parties that the Negro appellants meet all qualifications for admission, save race, and that the **refusal was based solely on the race of the Negro appellants.** *Girard Estate*, 4 D. & C. 2d 671, 672-3 (Phila. Orph. Ct. 1955);[8] *Pennsylvania v. Board of Directors of City Trusts, supra*, p. 231.

On September 24, 1954, the Negro appellants petitioned the Orphans' Court of Philadelphia County to order the Board of Directors of City Trusts to admit them, alleging,

[8] See also R. 69a. Under Girard's Will those who qualify are placed on an admission list and must be accepted for admission in order of application within certain priorities dictated by the Will based upon the place of birth of the orphan. *Soohan v. Philadelphia*, 33 Pa. 9, 28 (1859).

inter alia, that the Board's refusal violated the Fourteenth Amendment to the Federal Constitution (R. 62a, 72a). The Mayor of the City of Philadelphia and the Commission on Human Relations, a City agency, filed a separate petition joining in the request for relief sought by the Negro appellants, and also alleging that the Board's refusal violated the Fourteenth Amendment (R. 11a, 12a).* The Board of Directors of City Trusts filed an answer in which it admitted it was a City agency (R. 80-81a, 86a), but alleged that it could lawfully administer the College and implement the provision of the Girard Will limiting the admission to "poor white male orphans" by excluding Negroes.

Because of the provision of Girard's Will which would in certain circumstances give the property to the Commonwealth, and because of the Attorney General's authority and duty, *parens patriae*, to represent the beneficiaries of all charitable gifts in Pennsylvania, the Attorney General of the Commonwealth of Pennsylvania was informed of the proceedings at the suggestion of the hearing judge. See *Pruner's Estate*, 390 Pa. 529; *Garrison's Estate*, 391 Pa. 232. The Attorney General thereupon filed a petition in the Orphans' Court likewise alleging that the operation of Girard College on a racially restricted basis by the City, or by a private trustee because of the background of State aid and public administration violated the Fourteenth Amendment to the Federal Constitution as well as the public policy of Pennsylvania, and that the Negro appellants should be admitted (R. 116a-117a).

The hearing judge,[9] nevertheless, held that the City

---

* "R" references are to the Appellants' Record in the Pennsylvania Supreme Court and certified to this Court when this case was last before it.

[9] The testimony before the hearing judge presented on behalf of appellants was devoted principally to demonstrating that a racially segregated school was injurious to the white student and not in harmony with the objectives of education in a democracy. The chief witness who testified on behalf of appellants were as follows: Isadore Chein (psychologist), Ira De A. Reid (sociologist), Alice V. Keliher (educator), Gilbert F. White (educator), E. Sculley Bradley (Professor of American Civilization and American Literature), and Maurice B. Fagan (specialist in infer-group relations).

could exclude Negroes without violating the Fourteenth Amendment. This decision was affirmed by the court *en banc* and by the Supreme Court of Pennsylvania. 386 Pa. 548, 127 A. 2d 287 (1956). This Court, however, on April 29, 1957, reversed, holding that it violated the rights of the Negro appellants guaranteed them by the Fourteenth Amendment for the Board of Directors of City Trusts, a governmental body, to refuse admission solely on the basis of race even it was acting pursuant to the terms of the Will. The cause was remanded to the Pennsylvania courts for "further proceedings not inconsistent with this opinion." 353 U. S. at p. 231. The authority cited was *Brown v. Board of Education*, 347 U. S. 483. When the case was returned to the Orphans' Court of Philadelphia County, that court, **without notice, without a hearing, and without the request of any party to the litigation, sua sponte,** removed the Board of City Trusts and appointed a thirteen man Board.[10] Paragraph 3 of the Orphans' Court order of October 4, 1957, provides that six of those appointed:

> ". . . shall resign as members of the Board of Directors of City Trusts of the City of Philadelphia, effective upon the discharge of the said Board as trustee of this estate, following confirmation of its final account to be filed pursuant to decree of the court entered September 11, 1957." (7 Fiduc. Rep. (Pa.) 609).

It is uncontroverted that these six constituted a majority of the living appointed members of the Board of

---

[10] Had the Board of Directors of City Trusts petitioned the Court to be relieved of the trusteeship of Girard College in violation of the Act of 1869, there clearly would have been a "wilful and knowing failure" to carry out the terms of the trust, thus bringing into operation the forfeiture clause and the gift over to the Commonwealth, and in the event of further forfeiture, to the United States. Perhaps this is why the board presented no such request. The voluntary action of the Court obviated the need for such a petition.

Directors of City Trusts and included five of the eight members of the Executive Committee of that Board.

In the order the Orphans' Court denied, **solely on the basis of race,** the original petition of the Negro appellants for admission to Girard College.

The Negro appellants, the Commonwealth of Pennsylvania and the City of Philadelphia petitioned for reconsideration, again raising the federal constitutional questions raised throughout these proceedings and in addition asked that they have an opportunity to present evidence and oral argument, pointing out that in the absence thereof procedural due process was denied them as guaranteed by the Fourteenth Amendment.[11] The Orphans' Court denied these petitions. (7 Fiduc. Rep. (Pa.) 606-610).

A timely appeal was then taken to the Supreme Court of Pennsylvania and all appellants again raised the constitutional and federal questions which we now raise as questions numbered one through six. Particularly, the question of the constitutionality of the Fiduciaries Act of April 18, 1949, was specifically raised. For example, the brief filed on behalf of the Negro appellants included the following questions in the Statement of Questions involved:

> "2. Does §53 of the Pennsylvania Act of June 7, 1917, P. L. 519, or Art. IX, §921 of the Act of April 18, 1949, P. L. 512 require the Orphans' Court to remove the City of Philadelphia as Trustee solely because the City has a constitutional duty to admit Negroes to Girard College?" *(Not answered by the court below).*
>
> "3. If so construed do §§53 and 56 of the Pennsylvania Act of June 7, 1917, P. L. 519, or Art. IX, §921 and §901 of the Act of April 18, 1949, P. L. 512, violate the Fourteenth Amendment?" *(Not answered by the court below).*

---

[11] See Petition for Reconsideration filed by appellants, Certified Record.

The Commonwealth and the City of Philadelphia raised similar questions. The Supreme Court of Pennsylvania specifically passed upon the applicability of the Act in question. It said:

> "The Fiduciaries Act of April 18, 1949, P. L. 512, §331(5), which is the presently applicable statute, confers exclusive power on the Orphans' Court to remove a trustee 'when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office. . . .'" (App. A, *infra.*, p. 47).

In addition, the appellants raised the question of State action and the effect of the Fourteenth Amendment on the attempt of the Orphans' Court to substitute trustees at this stage of the proceedings, as well as the effect and meaning of this Court's previous mandate. All of these questions were passed upon by the Supreme Court of Pennsylvania in its Opinion.

The same federal Constitutional issues were again raised in a timely Joint Petition for Reargument filed on February 3, 1958. This Petition was denied by the court below without opinion on February 12, 1958, whereupon the Negro appellants, the Commonwealth of Pennsylvania, the Mayor and the City of Philadelphia filed this Appeal to this Court.

The "new" trustees filed an appearance in the Supreme Court of Pennsylvania and defended the Orphans' Court order appointing them and excluding the Negro appellants from Girard College.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND ARE OF GREAT PUBLIC IMPORTANCE.

I.

The actions of the courts of Pennsylvania on remand are in direct conflict with *Shelley v. Kraemer*, 334 U. S. 1; *Barrows v. Jackson*, 346 U. S. 249, and *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230.

A.

The Supreme Court of Pennsylvania in its opinion assumed the constitutionality of the ouster of the City as trustee and the substitution of the "private" trustees. It then considered that any federal constitutional limitations applied to these new trustees so appointed would apply with equal validity to all trustees of charitable trusts, including those which had never had any nexus with a public or governmental body. The Court having discounted the history of public aid and administration of Girard College, and misunderstanding the opinion of this Court that the College was within the ambit of the Fourteenth Amendment, proceeded to adumbrate the possibilities of applying the restrictions of the Fourteenth Amendment to all charities, including those which had been privately administered from their inception. The court below said: "A will is without any force and effects whatsoever until it is probated," and that "the admission of a will to probate constitutes judicial action." See App. A, *infra*, p. 53. The court below further argued: "if all that is necessary to constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment is State action and a racial or religious discrimination, then no private charity created by will can any longer dispense its benefits on the basis of race, creed or color according as its settlor has stipulated." See App. A., *infra*, p. 53.

But it is clear, and has been clearly stated throughout this entire litigation, that appellants find it unnecessary to make any contention of such breadth in the present case. No question of the right of a private citizen named in a will and acting as trustee pursuant thereto of an institution established, administered and maintained without the aid of public officials is involved in this litigation. Discussion of the advanced ground delineated *arguendo* by the Pennsylvania Supreme Court—that "no private charity created by will can any longer dispense its benefits on the basis of race, creed or color . . ." (App. A., *infra*, p. 53)—would serve only to obscure the instant problem. For it is appellants' view, confirmed by this Court's decision in *Pennsylvania v. Board of Directors of City Trusts*, *supra*, that the discriminatory bequest of Stephen Girard has never been "private" in character, and the more-than-a-century of history of Girard College cannot be obliterated by the magic of an Orphans' Court decree—a decree which, in any event, in no way affects a complex apparatus of continuing governmental controls. Moreover, if the Orphans' Court had the power retrospectively to revise the life of the great public institution which is Girard College—a process perhaps comparable with this Court's discharging the trustees of the Smithsonian Institution and declaring it "private"—exercise of such power to perpetuate what this Court has already found to be the unconstitutional exclusion of appellants Foust and Felder because they are Negroes would be precisely that "active intervention of the state courts, supported by the full panoply of state power," *Shelley v. Kraemer*, 334 U. S. at p. 19, which the Fourteenth Amendment forbids. *Railway Employees' Dept. A.F.L. v. Hanson*, 351 U. S. 225, 232 fn. 4. See also *Gandolfo v. Hartman*, 49 Fed. 181 (C. C. S. D., Calif., 1892); and *American Communications Ass'n, C.I.O. v. Douds*, 339 U. S. 382. Such actions, moreover, run afoul of decisions of the court holding that state action taken expressly for the purpose of removing all state connection with an activity

previously under the racial restrictions of the Fourteenth Amendment in order to avoid the proscriptions of that Amendment in and of itself violates the Amendment. See e.g., *Smith v. Allright*, 321 U. S. 649; *Terry v. Adams*, 345 U. S. 461; *Rice v. Elmore*, 165 F. 2d 387 (C. A. 4th, 1947).

Thus, this case, so viewed, obviates discussion of constitutional permissibility of judicial and executive supervision and enforcement of conventional private trusts of a discriminatory nature. Such questions—which, nonetheless, are plainly federal questions of gravest import [12]—can arise only if this Court accepts the rationale of the Pennsylvania courts that a *sua sponte* court order substituting "private" trustees (six of whom, it is to be recalled, are members of the Board of Directors of City Trusts) for the municipal trustee, entered after this Court's decision, has suddenly transformed Girard College into a genuinely private trust.

B.

The court below regarded *Shelley v. Kraemer*, and *Barrows v. Jackson* as inapplicable to the present case because in those cases, "The elements which brought the 'equal protection' clause of the Fourteenth Amendment into play . . . consisted of State action for the enforcement of a discrimination based on race or color in impairment of a constitutionally protected right of an individual to which he, along with all other members of the community, is entitled as a matter of public law. It is plain enough from the words of the Fourteenth Amendment that it is 'laws', and not claims under some private testament, whereof the Amendment guarantees everyone 'equal protection'. Manifestly, therefore, an element essential to the invocation of the 'equal protection' clause of the Fourteenth

[12] Comparable questions on at least two occasions have caused this Court to issue its writ of certiorari only to find that the question was not properly in the case. *Rice v. Sioux City Cemetery*, 348 U. S. 80, *grant of certiorari explained* in 349 U. S. 70, 72-74, and *Black v. Cutter Laboratory*, 351 U. S. 292.

Amendment is absent in this case." App. A., *infra*, p. 52. "Not coming within the qualifications required by Stephen Girard's will for admission to his Orphanage, the present applicants have no right to be beneficiaries thereof in defiance of the settlor's plainly expressed and legally valid testamentary provisions. Neither *Shelley v. Kraemer* nor *Barrows v. Jackson, supra*, teaches otherwise." [13] App. A., *infra*, pp. 49-50.

The difficulty with the position of the court below is that this Court has already, in this very litigation, held that appellants Foust and Felder have a constitutional right not to be excluded from Girard College on the basis of the racial qualification set by Stephen Girard. In continuing to insist that Foust and Felder are out of court because they do not come "within the qualifications required by Stephen Girard's will for admission to his orphanage," the State Supreme Court has failed to recognize that **the adoption of the Fourteenth Amendment imposed upon this publicly administered trust constitutional standards of nondiscrimination in admission which supersede the "white" provision of the will.** It is precisely this which is the "law of the case" under *Pennsylvania v. Board of Directors of City Trusts, supra.*[14]

What appellants here attack is the state action to alter the *status quo* so that a constitutional right which the Negro

---

[13] The analysis suggested by the Supreme Court of Pennsylvania would require a reversal of *Shelley v. Kraemer, supra.* For under Missouri Law, as a matter of Missouri common law, the deed to the Negro buyer was a nullity. It was only because the Fourteenth Amendment prohibited the application of the Missouri common law rule that the Negro buyer initially and ultimately obtained the constitutional right to occupy the land in question.

[14] The Pennsylvania Courts, moreover, have specifically recognized that a white boy can force Girard College to admit him, if he is qualified. *Soohan v. Philadelphia*, 33 Pa. 9 (1859) and, of course, the Attorney General clearly has standing to force a public charity to adopt and carry out admission policies which do not violate federal constitutional law.

appellants have under the *status quo* is not destroyed by the court inspired transfer.

To treat the present appeal as a new problem, as if it dealt with eligibility for admission to an institution, always private, is to blink the decisive fact that it was the Orphans' Court's own order, substituting new trustees, which created the wall of "privacy" now said to insulate Girard College from the Fourteenth Amendment. This case, therefore, is very much like *Railway Employes' Dept. A. F. L. v. Hanson*, 351 U. S. 225, where this Court held that a union shop agreement which would have contravened state law but for superseding federal legislation was subject to federal constitutional limitations, notwithstanding that the agreement affects so-called "private" rights. "If private rights are being invaded, it is by force of an agreement made pursuant to federal law, which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the federal statute . . . is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U. S. at p. 232.

So, in the instant case, exclusion of Foust and Felder was declared by this Court one year ago to offend the Constitution. To overcome this federal mandate, the Orphans' Court, ignoring the obligation imposed by Article VI, clause 2 of the Constitution, undertook to alter the structure of Girard College in such a way as to facilitate further racial exclusion, i.e., to legitimatize racial discrimination which had hitherto been unlawful. Recalling that a statute is involved—the challenged Fiduciaries Act of 1949—the appositeness of the *Hanson case, supra*, becomes complete. To paraphrase its language:

> "If private rights are being invaded, it is by force of an agreement made pursuant to [state] law which . . . declares that [federal] law is superseded . . .

> In other words, the [state] statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the [state] statute . . . is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U. S. at 232.

C.

In the instant case the vice of the challenged state action—whether its source be viewed as the order of the Orphans' Court or the underlying statutory authority embodied in the Fiduciaries Act of 1949—is even greater than in *Hanson*. There the governmental action was permissive: private agreements might or might not follow, depending on the unfettered will of private bargainers. But here the single necessary and intended result of the challenged state action was to perpetuate the Negro appellants' exclusion from Girard College. Indeed, the Orphans' Court completed the entire process itself by ordering the substitution of new trustees and ordering the final and permanent exclusion of Foust and Felder. The state Supreme Court's denial that the Orphans' Court's purpose was to exclude Negroes from Girard College is unavailing in the face of the patent facts. The only reason for attempting to rewrite the will of Girard, by altering the relationship of Girard College, "the Mayor, Aldermen and citizens of Philadelphia", the Commonwealth of Pennsylvania and the United States was to bring about a situation in which the continued exclusion of Foust and Felder because they are Negroes would be, in the judgment of the state courts, permissible as a matter of federal law. State action to such an end is barred by the Fourteenth Amendment. *Cf. Terry v. Adams*, 345 U. S. 461; *Rice v. Elmore*, 165 F. 2d 387 (C. A. 4th, 1947), *cert. denied*, 333 U. S. 875.

This conclusion may be tested by supposing that the instant litigation had arisen in rather different fashion.

If the Board of Directors of City Trusts had in the first instance *admitted* Foust and Felder, and the Orphans' Court, on its own motion or otherwise, had, in order to sustain its supervision of the Girard will, discharged the Board of Directors of City Trusts, substituted "private" trustees, and ordered the expulsion of Foust and Felder because they were Negroes, it is hardly to be supposed that such judicial action could be squared with the Fourteenth Amendment cf. *Barrows v. Jackson, supra.* Appellants submit, however, that the supposed situation and the actual one are from a constitutional point of view indistinguishable. In the case at bar, the determination that Foust and Felder were entitled not to be excluded on the basis of race was achieved not by a voluntary act on the part of the public trustee, but by the mandate of the Constitution as declared by this Court. Now, on **its own motion**, the Orphans' Court seeks to frustrate the rights authoritatively declared by this Court.

D.

In point of trust law, what the Orphans' Court sought to do was to transfer title to Girard College from "the Mayor, Alderman and citizens of Philadelphia" [15] to so-

[15] Such a gift clearly was a gift to the public and the estate became public property, albeit impressed with a trust. *Pruner's Estate*, 390 Pa. 529 (1957); See Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633. For, a gift to the City in trust for a charitable purpose is no different from a gift in fee for the same purpose. See Shanks, *"State Action" and the Girard Estate Case*, 105 U. OF P. L. REV. 213, 226 (1956), *Craig's Estate*, 356 Pa. 564, 52 A. 2d 650 (1947). The City thus became trustee for itself. The order of the Orphans' Court divests the City of a valuable property—approximately $100 million—and transfers it to a group of private individuals. Without notice or hearing and over the protests of the City, the rights of the City as trustee and beneficiary have been abrogated by this order. The constitutional rights of citizens cannot turn upon state law rules as to property ownership. "Title to property as defined by state law controls property relations: it cannot control issues of civil liberties." *Marsh v. Alabama*, 326 U. S. 501, at p. 511.

called "private" trustees. Simultaneously, so the Orphans' Court also believed, the beneficial interest which pursuant to the Fourteenth Amendment ran to all poor male orphans without racial differentiation, *Pennsylvania v. Board of Directors of City Trusts*, *supra*, would be restricted to the "white" orphans for whom it was reserved until 1868, the year of the Fourteenth Amendment's adoption.

For the Commonwealth of Pennsylvania or the City of Philadelphia to take property beneficially belonging to the general citizenry of Philadelphia and transfer interests in it in such a fashion that the beneficial use accrues only to white members of the community is unconstitutional. "It is not conceivable that a city can provide the ways and means for a private individual to discriminate against its own citizens." *Lawrence v. Hancock*, 76 F. Supp. 1004, 1009. It is clear that "the power to sell or lease must not include the power to discriminate against members of any race." *Tate v. Department of Conservation and Development*, 133 F. Supp. 53, 61 *affirmed*, 231 F. 2d 615. It would seem even plainer that a gratuitous transfer of nearly $100,000,000 worth of municipal property to "private" persons directed to administer the property on a discriminatory basis cannot be squared with the decisions of this Court. *Muir v. Louisville Park Theatrical Assn.*, 347 U. S. 971, *vacating* 202 F. 2d 275; *Dawson v. Mayor of Baltimore*, 350 U. S. 877; *Holmes v. City of Atlanta*, 350 U. S. 879.

In *City of Greensboro v. Simkins*, 246 F. 2d 425, the Court of Appeals for the Fourth Circuit sustained an injunction against exclusion of Negroes from a municipal golf course leased to and operated by private persons; the court observed:

> ". . . As pointed out in the Tate case, supra, the right of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property. The city may . . . part with ownership of the property by bona fide

> sale; and the court . . . will doubtless approve other dispositions if they will not result in unlawful discrimination against citizens on the ground of race or color. . . ."

So here only a bona fide disposition of Girard College which is otherwise conformable with the Girard will and which does not on a racial basis curtail the vested beneficial interest in the property, or in any consideration received therefor, of any of the "citizens of Philadelphia," would be a disposition consonant with the Fourteenth Amendment.[16] And, it should be added, even such a disposition cannot arbitrarily cut off the proprietary rights of the United States as ultimate successor trustee and legatee, for these rights, as the Orphans' Court had made plain in this very litigation (4 D. & C. 2d 701, 702 (1955)) are recognized by Pennsylvania law and cannot therefore be summarily extinguished. *Cf. United States v. Burnison*, 339 U. S. 87. And whether the federal government's rights as trustee can be by-passed in favor of persons not named in the will is truly a question of federal law. *Cf. Clearfield Trust Co. v. United States*, 318 U. S. 363; *American Houses, Inc. v. Schneider*, 211 F. 2d 881 (3rd Cir., 1954). Clearly federal law would not permit the exercise of federal judicial power to allow Girard College to continue as a racially segregated school. *Cf. Hurd v. Hodge*, 334 U. S. 24.

II.

The administration of the college remains infused with "State action" despite the removal of the City as trustee and substitution of "private" trustees.

---

[16] The City may not dispose of property dedicated for public purposes even for fair value since the rights of the citizens as to the beneficial use of such property cannot be destroyed. 3 Dillon, Municipal Corporations (5th Ed.), §1102: "A Municipal Corporation has no implied or incidental authority to alien or dispose of for its own benefit, property dedicated to, or held by, it in trust for public uses. See also *Hoffman v. Pittsburgh*, 365 Pa. 386 (1950); *Comm. v. Rush*, 14 Pa. 186 (1850).

A.

Girard College is now an educational institution inused with State action in the fullest sense, requiring the application of the Fourteenth Amendment thereto regardless of who now becomes the trustee. Girard's intention and the legislative implementation and the City management of the Estate for over 127 years and of the school for 107 years, increasing the fund from $2,000,000 to $100,000,000 and building a good educational institution serving over 1,300 boys at a time, have impressed upon the College a governmental and public character which now cannot be eradicated by decree. Judicial substitution of trustees cannot alter the effects of more than a century of history. The numerous statutes enacted to authorize and direct the City of Philadelphia to carry out the Trust, the numerous statutes enacted to change the law of Pennsylvania so certain provisions of Girard's will with respect to guardianship and indentureship could be carried out, its tax exempt status, and the 127 years of City administration of the will taken cumulatively constitute the type of State aid and help which makes the resultant institution subject to the prohibitions of the Fourteenth Amendment. *Cf. Kerr v. Enoch Pratt Free Library*, 149 F. 2d 212 (4th Cir., 1944), *cert. denied*, 326 U. S. 721; *Marsh v. Alabama*, 326 U. S. 501; *Public Utilities Commission for the District of Columbia v. Pollak*, 343 U. S. 451; *Steele v. Louisville and Nashville R. R. Co.*, 323 U. S. 192; *Brotherhood of Railway Trainmen v. Howard*, 343 U. S. 768.

As set forth in the Statement of Facts, the Supreme Court and the Orphans' Court of Pennsylvania have repeatedly referred to the statutes enacted with respect to Girard College as special acts "giving legislative sanction" to certain provisions of the Will. *Supra*, pp. 12-18. The substitution of the "private" Board of Trustees had no effect upon the statutory duty of the Mayor of the City of Philadelphia and the Board of City Trusts to remain as guardian

of all Girard College students and also to supervise the indenturing of the students. Likewise, the Council of the City of Philadelphia and the Legislature of Pennsylvania will still be under the statutory duty to visit the College and accept annual accounts. In addition the City Treasurer and the City Controller are still under statutory duties to keep the funds of the College and to audit the accounts annually. No action of the state courts can relieve these public officials of duties conferred upon them by state statutes still on the books. The Orphans' Court has no jurisdiction over these officials. They are not parties to the action.

B.

Significantly, the "new" Board itself is a creature of the state and of state law. In addition, the order appointing the new Board specifically requires six members of the old Board to resign from their governmental position on the City Board of Directors to accept the duties of the new Board.

It is significant that in selecting six of the present twelve appointed members of the Board of Directors of City Trusts as substituted individual "private" trustees, the Orphans' Court added one additional dimension to the state action already present. These six former members of the Board included its President and two of its three Vice Presidents. In addition, they constitute a majority of the appointed members of the Board. They now constitute almost one-half of the membership of the new "private" trustee group. Hence, if the decrees are enforced they will have the effect not only of transferring public property and governmental functions to private persons, but also of requiring or directing that those City officers now performing these functions resign their governmental offices effective upon discharge of the Board as trustee, by the Orphans' Court, in order to perform the identical functions as private persons. This, we submit, is state action in plainest violation of the Fourteenth Amendment. *Terry v. Adams*,

345 U. S. 461 (1953); *Rice v. Elmore*, 165 F. 2d 387 (C. A. 4th 1947), *cert. denied*, 333 U. S. 875 (1948); *Lawrence v. Hancock*, *supra*.

Clearly, the Orphans' Court decrees do no more than to change the labels of the active public administrators of Girard College and now call them "private" administrators. Such a decree is, in substance, a violation of the mandate of the Supreme Court of the United States.

C.

Whether the gift for the College and the competency of the City to act as trustee may have been upheld even in the absence of the implementing legislation is an academic question of no real pertinence here. The critical fact is that there remains active City participation in the administration of Girard College pursuant to state statutes dealing with the guardianship of the students. Hence, "state action" is still vital to the operation of the school, despite the substitution of "private" trustees for the City.

The Act of February 27, 1847, P. L. 178, and the supplementing Act of April 20, 1853, P. L. 624, dramatically illustrate how the sovereign power of the state is invoked to bring to fruition the private testamentary scheme. These acts are special statutes enacted to implement the Will. Indeed, the Act of February 27, 1847, is entitled "An Act Relative to the Girard College for Orphans" (App. B, *infra*, p. 87. By this statute, the Pennsylvania law relating to the indenturing of orphan children was altered specifically and solely for Girard College. The Act changed the ages for indenturing to comply with those fixed in Girard's Will. It provides for the expiration of the indenture if before attaining the age of fourteen, the child is expelled from the College because of misconduct. In fact, there are several provisions requiring action to be taken "according to the Will [of Stephen Girard]," thus incorporating by reference provisions of the Will into the statute. The most intimate rights of guardianship and indenture of minors are pre-

scribed by state statute only for the students at Girard College and in terms complying with the requirements of the Will.

While it may be asserted that "Girard did not stipulate that any such legislation be enacted", he provided this in effect in Article XXI, paragraph 5, of his Will which prohibits the admission of any orphan until such a law came into existence (R. 36a-37a). Accordingly, but for state law, the College cannot properly be administered today. And even if operated by "private" trustees, the school's life lines are so dependent on "state action" that to deny admission solely on the basis of race or color violates the Fourteenth Amendment.

Moreover, the fact that education of children—"perhaps the most important function of state and local governments," *Brown v. Board of Education, supra*, at p. 493—is involved makes the state action even more apparent. *Cf. Terry v. Adams, supra;* see Note, *City's Operation of Schools under Discriminatory Will Does Not Violate the Fourteenth Amendement*, 56 COLUM. L. REV. 285, 287 (1956); Fairman, *Mr. Justice Bradley*, at p. 91, in Dunham and Kurland, MR. JUSTICE (1956).

III

Appellants submit that the errors committed by the Pennsylvania courts have their genesis in their misinterpretation of this Court's mandate which remanded the causes to the Pennsylvania courts "for further proceedings not inconsistent with this opinion." The Pennsylvania courts read this provision as an instruction that the courts did not have to admit the Negro appellants to Girard College.[17] The basis for the interpretation was *Sweatt v. Painter*, 339 U. S. 29, where "immediately preceding, and as a part of the order of reversal [of this Court], there is the specific ruling by the Court that 'the Fourteenth

[17] Mr. Justice Musmanno in his dissents from the remand order and the decision from which this appeal is taken construed this Court's mandate to require immediate admission of the Negro Appellants to Girard College.

Amendment requires that petitioner be admitted to the University of Texas Law School.' The mandate in the instant case contains no such directive." See App. A, *infra*, p. 41. This mandate, however, should be compared with those in which questions of fact or state law were explicitly left open for the determination of the state court. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435. The Pennsylvania Court's interpretations of this Court's mandate ignore completely the cases in which there was only the general direction and yet the Negro appellant was admitted to the previously all white institution. See *e.g., Frazier v. Board of Trustees of University of North Carolina*, 134 F. Supp. 589 (M.D.N.C. 1955) aff'd. 350 U. S. 979; *Sipuel v. Board of Regents*, 332 U. S. 631. Only this Court has the power to supervise and to give an authoritative interpretation of the meaning of its mandates. See *Evasion of Supreme Court Mandates by State Courts*, 56 Yale L J 574; *Allegheny Corp. v. Breswick*, ——U. S. ——, 2 L. Ed. 2d 374 (1958). Here the admission of Negro appellants was the only question before the court. No party to the litigation had requested or ever suggested that the City of Philadelphia should be ousted as trustee—especially of the entire Estate.

If the interpretation of the Supreme Court of Pennsylvania is left standing, it would mean that this Court's decision of April 27, 1957 was purely an advisory opinion not adjudicating the rights of the Negro appellants despite this Court's clear holdings ever since *Hayburn's Case*, 2 U. S. 409 (1792), that it would not render advisory opinions.

IV

The questions presented by the instant case and by the decision of the court below are substantial and important. That decision is not an isolated decision of an inferior court, which, though in error, does not present that recurring type of situation which this Court will review. There are numerous public institutions publicly administered which may seek to be metamorphosed into private institutions to evade the restrictions of the Fourteenth Amend-

ment. The action of the Pennsylvania courts, albeit unwitting, provides a blueprint for the evasion of the decrees of this Court.

This Court has always been solicitous of individual rights, and particularly so in areas of racial discrimination and segregation.

The litigation involves an institution which ranks fifth in total endowment behind Harvard, Yale, Columbia, and the University of Texas. 66 YALE L. J. 979, 984 Fn. 19. And the legal issues raised are as important and as far reaching as those disposed of in this Court's opinion in the earlier stage of this litigation.

CONCLUSION

The questions herein presented are substantial and of public importance.

Respectfully submitted,

LOIS G. FORER,
Deputy Attorney General,
THOMAS D. MCBRIDE,
Attorney General,
Attorneys for the Commonwealth of Pennsylvania.

ABRAHAM L. FREEDMAN,
Special Counsel,
DAVID E. PINSKY,
JACOB J. SIEGAL,
Assistant City Solicitors,
DAVID BERGER,
City Solicitor,
Attorneys for the City of Philadelphia, Richardson Dilworth, Mayor of the City of Philadelphia, and the Philadelphia Commission on Human Relations.

WILLIAM T. COLEMAN, JR.,
RAYMOND PACE ALEXANDER,
LOUIS H. POLLAK,
Attorneys for Appellants William Ashe Foust and Robert Felder.

April 23, 1958

APPENDIXES

Appendix A

OPINIONS AND JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

In re: GIRARD COLLEGE TRUSTEESHIP

Nos. 109 to 121 inclusive, January Term, 1958

Reported at 391 Pa. 434

OPINION BY MR. CHIEF JUSTICE JONES, January 24, 1958:

When this matter was here before, we affirmed the action of the Orphans' Court of Philadelphia County denying admission to Girard College to William Ashe Foust and Robert Felder, poor male Negro orphans, for the reason that the will of Stephen Girard, the founder and endower of the College, expressly restricts admission to "poor male white orphans": see *Girard Will Case*, 386 Pa. 548, 551, 127 A. 2d 287. Although the institution is referred to as a College, the testator himself aptly termed it an "Orphan Establishment" in one of two codicils which, with the decedent's will, were probated shortly after his death in 1831.

The will nominated and appointed as trustee of the charity the Mayor, Aldermen and Citizens of Philadelphia, the then corporate title of the City, which duly entered upon its trust duties. But, for years, the College has been administered by the Board of Directors of City Trusts of Philadelphia, a body statutorily created by the Act of June 30, 1869, P. L. 1276. The Act empowered the Board to accept and execute charitable trusts bequeathed to the City of Philadelphia, as trustee, whereof a large number, following Girard's lead, had come into existence: see *Philadel-*

phia v. Fox, 64 Pa. 169, 172 et seq. For the proper administration of the trusts committed to it, the Board of City Trusts is accountable to the Orphans' Court of Philadelphia County: *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545, 188 A. 588. That court, deeming the Board of City Trusts to be like any other trustee which is a creature of statute and authorized to accept and administer private trusts, held by its decrees, which we affirmed, that the Board of City Trusts was bound to abide faithfully by the restrictions which Girard's will imposes on admissions to the College.

However, the Supreme Court of the United States reversed our judgment of affirmance and remanded the cause for further proceedings not inconsistent with that Court's opinion which held that the Board of City Trusts is an agency of the State of Pennsylvania and that, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the College because they were Negroes was discrimination by the State which is forbidden by the Fourteenth Amendment, citing *Brown v. Board of Education*, 347 U. S. 483: see *Pennsylvania v. Board of Trusts*, 353 U. S. 230.

In obedience to the Supreme Court's mandate, we vacated the decrees of the Orphans' Court and remanded the cause to that court "for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its said mandate," a true and correct copy thereof being appended to our order of remand.

The Orphans' Court, construing the Supreme Court's opinion to mean no more than that the Board of City Trusts was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of its founder, entered decrees removing the Board as trustee of Girard College and substituting for that purpose thirteen private citizens none of whom holds any public office or otherwise exercises any governmental power under the Commonwealth of Pennsylvania or any of its political or municipal subdivisions. It is these decrees

which are now before us for review on the separate appeals of Foust, Felder, the Commonwealth of Pennsylvania and the City of Philadelphia (the State and City having voluntarily become parties to the proceedings). Simply stated, the question for decision is whether the action of the Orphans' Court is inconsistent with the opinion of the Supreme Court of the United States.

It is the appellants' contention that the Supreme Court's mandate required the Orphans' Court to order the Board of City Trusts to admit Foust and Felder to Girard College forthwith. With that, we cannot agree. Had the Supreme Court so intended, it would have said so just as it did in *Sweatt v. Painter*, 339 U. S. 629 (1950), where there was involved a state-supported University's denial of admission to a Negro because of his race. The order of reversal in the *Sweatt* case also included a remand of the cause for further proceedings not inconsistent with the Supreme Court's opinion but, immediately preceding, and as a part of the order of reversal, there is the specific ruling by the Court that "the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School." The mandate in the instant case contains no such directive.

The appellants' effort to make a "segregation" issue out of Stephen Girard's private charity, merely because of the inability of the Board of City Trusts, as trustee, to comply with the donor's express directions, serves only to confuse and obscure the real issue involved as to the right of a private individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced. In *Holdship v. Patterson*, 7 Watts 547, 551 (1838), Mr. Chief Justice Gibson pertinently stated that a testamentary benefactor "has an individual right of property in the execution of the trust, and to deprive him of it would be a fraud on his generosity. To appropriate a gift to a purpose *or person* not intended, would be an evasion of the donor's private dominion" (Emphasis supplied). As lately as *Borsch Estate*, 362 Pa. 581,

586, 67 A. 2d 119 (1949), we recognized, as constitutionally safeguarded, the right of a benefactor to have enforced the limitations and restrictions affixed to his testamentary gift. The exercise of that right is but one of the manifestations of the right of private property which is fundamental to our social, economic and political order and whose preservation unimpaired is as vital to our Negro citizens as it is to their white brethren.

As we read the Supreme Court's opinion, what it holds, and all that it was presumably intended to hold, in view of what was then before the Court, is that the Board of City Trusts, being a State agency, is incapable of administering Girard College in strict compliance with the founder's prescribed racial restriction on admissions without being guilty of a violation of the Fourteenth Amendment. However, the Supreme Court did not say that there is any Constitutional or other legal barrier to the removal of the Board of City Trusts as trustee of Girard College in order that the Orphanage can be administered in accordance with all of the testator's express directions including the qualifications for admission to the student body. On the other hand, there is high authority for such procedure where a trustee is either unable or fails or refuses to administer a trust in accordance with the lawful directions of the settlor.

In *Vidal et al. v. Girard's Executors*, 43 U. S. (2 Howard) 126, 188 (1844), which was concerned with an attempt by Stephen Girard's heirs to nullify the Girard Trust, one the grounds of attack was that the City of Philadelphia, a municipal corporation, was legally incapable of executing the trust. In rejecting this contention Mr. Justice STORY, speaking for the Supreme Court, said: "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court,

possessing equity jurisdiction, to enforce and perfect the objects of the trust."

Subsequent to the "Consolidation Act" of February 2, 1854, P. L. 21, which enlarged the physical area of the City of Philadelphia by incorporating therein outlying territory, Girard's heirs renewed their attack on the trust. The case again went to the Supreme Court of the United States where it was argued that the "Consolidation Act" had "either dissolved or destroyed the identity of the original corporation [City of Philadelphia], and it is consequently unable any longer to administer the trust." Mr. Justice GRIER, who delivered the opinion of the Court, said, "Now, if this were true [that the City could no longer act as trustee of the Girard Estate], the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee": *Girard v. Philadelphia*, 74 U. S. (7 Wall.) 1, 12, 13 (1868).

The inability of the Board of City Trusts to apply constitutionally the racial criterion prescribed by the testator for admissions to Girard College affects *the trustee* and *not the trust*. As the opinion for the Orphans' Court so well states, "It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to the trust and not the trust to the trustee." It necessarily followed, therefore, that the course to be pursued in order that the trust may continue to be fully effectuated in accordance with the benefactor's intent was not to obliterate by judicial fiat an express term of his will which, as a private individual, he had a legal right to impose (see *City of Philadelphia v. Girard's Heirs*, 45 Pa. 9, 26) but for the court, which has jurisdiction of the trust and its fiduciary, to appoint substitute trustees capable of carrying out the testator's lawful prescriptions. And, that is precisely what the Orphans' Court has done.

The appellants argue, however, that "As a result of legislative implementation and City management, Gir-

ard College has taken on a "public character" and must, therefore, be administered as a public charity by a public body suject to the inhibitions of the Fourteenth Amendment. We are unable to perceive the slightest basis for the contention either in Girard's will or in legislation passed in relation to the Girard Estate.

The testator's primary and dominant object was to found a private charitable institution for the training, education and maintenance of poor male what orphans. Thus, his will expressly declares: ". . . I am *particularly desirous* to provide for such a number of *poor male white orphan children*, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of *public* funds . . . ." He directed that certain physical things be done on the land he devised for the College "so that the establishment [i.e., the College] may be rendered secure and *private*." And, upon devoting, secondarily, specified income from the trust fund to the promotion of the prosperity of the City and the health and comfort of its inhabitants, the testator directed that such income should be applied yearly for the indicated purposes but only "after providing for the College as hereinbefore directed as my *primary object*" (all emphasis above supplied).

It is not possible to read Girard's will without being deeply impressed with the fact that it was *the College, as a private charity*, and *not the trusteeship of the City*, that was the primary object of the donor's testamentary scheme. Of course, a trustee was a necessary and unavoidable incident of the trust, and the testator, desiring the continuity of the institution, availed himself of the services of the only existing local corporate body capable of administering the trust in perpetuity. What the will so clearly reveals as to the intended paramountcy of the private charity has long since been judicially recognized. In *Girard v.. Philadelphia*, supra, the Supreme Court of the United States spoke of the College, just as the testator had done, as the "primary

object" of the three objects to which the income of the whole residuary estate was to be devoted. Cf. also *Vidal et al. v. Girard's Executors*, supra. And, in *City of Philadelphia v. Girard's Heirs*, supra, this court, in construing the Girard will, declared that its dispositive portion was "a devise of all the residue of his real and personal estate to the city of Philadelphia, an existing corporation, in trust, as his 'primary object', to construct, furnish, constitute, and maintain the institution now known as the Girard College . . . ."

The private character of the trust and the privacy of the Orphanage which the trust was established to maintain and administer were aptly described in *Girard Will Case*, supra, as follows: "All provisions of the will show that it was not intended to be a public school; indeed, it is not merely a school at all but what Girard himself called a codicil to his will, an 'Orphan Establishment,' a home where the fatherless boys eat, sleep, study and live together, enjoying the testator's bounty which provides for them not only an education but also lodging, board, clothing and all the necessities of life. . . . Girard College is a comparatively large institution, but no different legal principles apply to it for that reason than to the smallest of private schools. It is erected on land owned by Girard and the buildings were constructed with his own funds. . . . The college has been supported and maintained for now over a century by Girard's estate; not a penny of State or city money has ever gone into it; no taxpayer has ever been called upon to contribute to it; true, it is exempt from local taxation, but so are all other charities even though restricted as to their beneficiaries and managed by private trustees.".

The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate. Certain it is that no additional legislation was required to clothe the City with the fiduciary powers necessary for the administration of Girard College. The Supreme Court said in this very conection in *Vidal et al. v. Girard's Executors*, supra: "We think, then, that the charter of the

city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania." The legislative enactments which the appellants stress were designed in large part to able the Commonwealth and the City to receive and use for their governmental purposes pecuniary legacies bequeathed directly to them by Girard's will. The rest of the legislative enactments were purely administrative measures neither envisioned nor required by Girard's will. And, the same can be said for the ordinances which the appellants cite.

What Mr. Chief Justice LOWRIE so clearly recognized for this court in *Philadelphia v. Girard's Heirs*, supra, is peculiarly apposite here: "In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that are intended for adaptation to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency."

Little less than startling is the suggestion that the State or City could, by legislation enacted by either of them after Girard's death, alter or affect the terms of his will respecting the creation and administration of Girard College which did not call for or require legislation to make it an operating charitable institution. There is nothing in the testator's will or in any legislation by the Common-

wealth or the City that serves to make Girard College a public charity or that requires that it be publicly administered. On the contrary, we hold, on the basis of the compelling testamentary evidence, already noted, that Girard College is a private charity capable of being lawfully administered by private trustees.

In removing the Board of City Trusts as trustee of Girard College and in substituting the private individuals as trustees for that purpose, the Orphans' Court acted well within its jurisdiction and powers. It has had jurisdiction over testamentary trusts at least since the Act of March 29, 1832, P. L. 190, §4: see *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545, 548, 188 A. 588, where it was said that "Whatever may have been the uncertainty as to the jurisdiction of the orphans' court prior to 1832, the Act of March 29, 1832, P. L. 190, Section 4, and the decisions which followed it, cleared away. It provided that the jurisdiction of the several orphans' courts shall extend to embrace trustees who are accountable in any way for the property of a decedent." It has also had jurisdiction over trusts for the benefit of orphans since the Act of March 27, 1713, 3 Pa. Stat. at Large 14, Chap. 197.

The Fiduciaries' Act of April 18, 1949, P. L. 512, §331(5), which is the presently applicable statute, confers exclusive power on the Orphans' Court to remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." Over and above such statutory power, it has long been established that the Orphans' Court possesses the power of a court of chancery in aid of an exercise of its jurisdiction: see *Stevens's Estate*, 200 Pa. 318, 322, 49 A 985. What was said there in the opinion of the court below, whereon this court affirmed *per curiam*, is presently so pertinent as to justify the following quotation: "The courts of Pennsylvania have looked with favor upon charities, and the law of the state, as administered from the beginning of this province, has always been broad enough to discern the objects of every

charity and to preserve and enforce it, nothwithstanding any defect, such as want of power in the trustees or otherwise: The Apprentices' Fund Case, 13 Pa. C. C. Rep. 241. Therefore, when a charity is established in any manner, such a slight impediment as a defect or want of power in the trustee to execute it does not stand in the way; the charity remains; the trustee is declared incapable of acting, and a competent trustee is appointed in his place. Chancery here steps in to enforce it and commits it to some one who may lawfully administer it: Frazier v. St. Luke's Church, 147 Pa. 256."

The contention which the appellants advance that the Act of 1869, supra, which created the Board of Directors of City Trusts, divested the Orphans' Court of any power to remove the Board of City Trusts as trustee is utterly lacking in merit. As this court recognized in *Philadelphia v. Fox*, 64 Pa. 169, 183 (1870), all that the Act of 1869 did was to make a change in the internal organization of the municipality by providing that one class of its functions (i.e., as fiduciary for private charities) should be administered in a manner different from what it had been theretofore. In *Wilson v. Board of Directors of City Trusts*, supra, where the Orphans' Court was held to possess plenary powers over trusts administered by the Board of City Trusts, it was pointed out that "The Act [of 1869] in no way ousted [the Orphans' Court's] jurisdictional control, and the fact that [the Act] required reports to be made to the City Council and others did not divest the orphans' court of the normal control that it had hitherto exercised over all trust estates created by will. Its power has been recognized since the passage of that Act."

No useful purpose would be served by discussing at greater length the jurisdiction of the Orphans' Court over testamentary trusts and their fiduciaries or the power of that court to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed. Such a situation calls for the removal of the incapable trustee and

the substitution of a fiduciary able to administer the trust as its provisions require; and the jurisdiction and power of the Orphans' Court to that end is not open to question. Here, there is a conclusively adjudicated want of capacity in the Board of City Trusts to administer Girard College in accordance with the intention and directions of the testator's will. There was, therefore, nothing other for the Orphans' Court to do in the circumstances but to remove the inhibited trustee and appoint trustees capable of administering the College as Stephen Girard intended and prescribed.

The appellants assert that the action of the Orphans' Court in removing the Board of City Trusts and in substituting therefor trustees capable of administering Girard College in accordance with the settlor's directions constituted State action which denied to the minor applicants the equal protection of the laws guaranteed them by the Fourteenth Amendment. As support for this contention, they cite *Shelley v. Kraemer*, 334 U. S. 1, and *Barrows v. Jackson*, 346 U. S. 249. The pertinently distinguishing feature of those cases is that in each of them it was a *constitutionally guaranteed right* of an individual that was subjected to the inhibited discrimination based on race or color. No such right is involved here, as we believe will clearly appear.

Concededly, it has long been authoritatively established that an official act of a member of a State's judiciary constitutes State action within the contemplation of the Fourteenth Amendment. No one will gainsay that. See *Ex Parte Virginia*, 100 U. S. 339; also, *Shelley v. Kraemer* and *Barrows v. Jackson*, *supra*. The fallacy in the appellants' argument lies in the fact that the complained-of discrimination in the instant case does not impinge upon any *civil right* to which the minor petitioners have a constitutional claim along with all other members of the community. Not coming within the qualifications required by Stephen Girard's will for admission to his Orphanage, the present applicants have no right to be beneficiaries thereof in defiance of the

settlor's plainly expressed and legally valid testamentary provisions. Neither *Shelley v. Kraemer* nor *Barrows v. Jackson, supra*, teaches otherwise.

On the contrary, in *Shelley v. Kraemer*, where a party to a racially restrictive agreement relative to private property sought equitable enforcement of the covenant against Negro purchasers of portions of the restricted property, the Supreme Court took occasion to observe, first of all, that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property" and then declared that "Equality in the enjoyment of property rights . . . [is] an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." The undisputed facts in the *Shelley* case made it clear that, but for the active intervention of the State court, the Negro purchasers would have been free to occupy the properties in question without restraint. Thus, the State had made available to the covenantees the full coercive power of government to deny to the Negro purchasers, on the ground of race or color, the constitutional right to own and enjoy property which they were willing and financially able to acquire and which the grantors were willing to sell. As contrasted by the Supreme Court, "The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to the petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." In the instant case, no one not possessing the qualifications prescribed by Girard's will for admission to the Orphanage can claim any right that entitles him to share Stephen Girard's largesse on an equal, or any, footing with those whom Girard himself expressly made the beneficiaries of his bounty.

Barrows v. Jackson was also a suit by a covenantee of a racially restrictive agreement, brought to recover from a breaching covenantor the contractually stipulated dam-

ages due for selling restricted property to a Negro. The only parties to the suit were the signatories to the restrictive agreement. No attempt was made to enjoin the Negro purchaser from enjoying the property which he had so acquired. The State court on the rationale of the *Shelley* case, denied the plaintiff a recovery. The Supreme Court, in affirming the judgment of the State court, reasoned as follows: "To compel respondent to respond in damages would be for the State to punish her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. . . . If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant."

Thus in *Barrows*, just as in the *Shelley* case, although in a different form of action, it was the supplicated judicial enforcement of a claim arising out of a racially restrictive covenant in impairment of a Negro's constitutionally guaranteed civil right that was deemed to be discrimination by State action which the Fourteenth Amendment inhibits. This seems plain enough, for, immediately after referring to the effects of the restrictive covenant on the owner's exercise of her property rights, the Supreme Court at once said,—"The next question to emerge is whether the State action in allowing damages deprives anyone of rights protected by the Constitution". Thereupon, the Court concluded that the State action did so operate, saying,—"If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws

in violation of the Fourteenth Amendment. See *Shelley*, supra."

Nowhere in *Shelley v. Kraemer* or in *Barrows v. Jackson* did the Supreme Court denounce as void the restrictive covenants respectively involved in those cases. Such covenants are recognized as valid *inter partes* so long as they are adhered to voluntarily. Notwithstanding the discriminatory nature of a covenant restricted on the basis of race or color, no one can compel the covenantor to sell his property in violation of his restrictive agreement or otherwise force him to desist from abiding by his covenant. To do so would be to invade *his* constitutionally guaranteed right of dominion over his own property. And, that would be no less true of Stephen Girard's trust were we to hold that, because of his testamentary limitation on admissions to Girard College to "poor male white orphans", he has been guilty of an unconstitutional discrimination by virtue of the Fourteenth Amendment wherefor all *poor male* orphans, regardless of color, are eligible for admission to that institution.

The elements which brought the "equal protection" clause of the Fourteenth Amendment into play in *Shelley v. Kraemer* and *Barrows v. Jackson* consisted of State action for the enforcement of a discrimination based on race or color in impairment of a constitutionally protected right of an individual to which he, along with all other members of the community, is entitled as a matter of public law. It is plain enough from the words of the Fourteenth Amendment that it is "laws", and not claims under some private testament, whereof the Amendment guarantees everyone "equal protection". Manifestly, therefore, an element essential to the invocation of the "equal protection" clause of the Fourteenth Amendment is absent in this case.

We are not unmindful that, when the Supreme Court reversed our former action in this case and remanded the record for further proceedings not inconsistent with its opinion, there was likewise present only the action of the State agency as trustee of Girard College and the racial

discrimination on admissions imposed by Girard's will which the trustee was enforcing. In short, then as now, there was no violation of a constitutionally protected right possessed alike by everyone. We have already indicated our belief that, had the Supreme Court intended that the court below, having jurisdiction and supervisory control over the trustee of Girard College, should admit the Negro applicants forthwith, it would have plainly said so just as it did in *Sweatt v. Painter*, supra. This deduction is, of course, a negative approach to the intended scope of the Supreme Court's ruling. Our positive interpretation of it is that *a State agency*, even when acting as the trustee of a private charity, can have *no part* in the enforcement of a racially discriminatory restriction regardless of what type of rights it affects. It need hardly be remarked that, had our study of the Supreme Court's opinion led us to the conclusion that no trustee, other than the Board of City Trusts, can lawfully administer Girard College, we would have been alert to carry out the ruling to the full extent of its implications.

Furthermore, if all that is necessary to constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment is State action and a racial or religious discrimination, then no private charity created by will can any longer dispense its benefits on the basis of race, creed or color according as its settlor has stipulated. A will is without any force or effects whatsoever until it is probated. This is so elementary as not to require citation of authority; and, equally fundamental it is that the admission of a will to probate constitutes judicial action whether it be by the register, the surrogate or some other officer thereunto authorized by law. It is plain enough, therefore, that State action is necessary to effectuate a will which creates a private charity whose benefits are dispensed on the basis of race, creed or color. What keeps such a charity, so created and restricted, from constituting a violation of the "equal protection" clause of the Fourteenth Amendment is that no one who does not come within the settlor's definition of

beneficiary has a constitutionally protected right (or any right for that matter) to share in the charity's benefits.

Further dissimilarity between the *Shelley* and *Barrows* cases on the one hand and the instant case on the other is in the fact that in the former cases the full power of the State by way of court enforcement of the racially restrictive covenants was sought and relief refused, while in the present instance all that has happened is that, in the course of the proceeding instituted by the two Negro boys for admission to Girard College, the Orphans' Court, having been authoritatively advised that the Board of City Trusts is incapable of administering Girard College as its founder directed, removed the incapable trustee and appointed other fiduciaries who can administer the College in the manner Stephen Girard prescribed. In so doing the Orphans' Court did no more than it would do in any case upon ascertaining that a trustee was no longer capable of discharging his fiduciary duties competently and adequately.

The appellants argue, however, that, because the substituted trustees will continue to restrict admissions to Girard College to poor male orphans of a particular race, whom Girard by his will specified as alone eligible for admission, the action of the Orphans' Court will deny the present applicants of a different race the equal protection of the laws guaranteed them by the Fourteenth Amendment. In aid of this argument, the appellants unwarrantedly charge that the Orphans' Court's exercise of its judicial power in the premises was "for the sole purpose of excluding Negroes from Girard College" and that the action "was taken solely in order to enable the school to remain segregated." The Orphans' Court did not act to *exclude* Negroes from Girard College. None had ever been admitted. What the Orphans' Court did was to refuse to admit the Negro applicants because they did not qualify for admission under the terms of Girard's will. And, to speak of Girard College as remaining "segregated" as a result of the Orphans' Court action is to use a term whose present-day stigmatizing connotation has no proper place in this case.

The appellant City persists in its complaint that it was denied procedural due process by the Orphans' Court's entry of its decrees, after the remand, without further hearing before that court. Brief reference to the procedural steps pursued in this litigation will at once disclose that all parties have been fully heard. Hearings on the petitions of Foust and Felder were held for days before the Orphans' Court where testimony was taken *in extenso* and the matter thoroughly argued by counsel. Exceptions to the hearing judge's decrees were filed and thereafter argued by counsel for appellants before the court sitting *en banc*. Following entry of the final decrees, the matter was appealed to this court and then carried to the Supreme Court of the United States. When the cause was lately remanded to the Orphans' Court pursuant to the Supreme Court's mandate, there was no occasion for any further hearing in the matter. The record was complete. It was the duty of the Orphans' Court, just as it is our duty now, to proceed in a manner not inconsistent with the opinion of the Supreme Court. And, that, we think we are doing.

The decrees are affirmed at the cost of the Commonwealth of Pennsylvania and the City of Philadelphia.*

DISSENTING OPINION BY MR. JUSTICE MUSMANNO.

In May, 1777, Stephen Girard of Bordeaux, France, landed in Philadelphia where he took up permanent residence and entered into business. Success smiled on his various commercial enterprises and, as ship owner, banker, and merchant, he accumulated an amount of wealth that made his name one to be conjured with on the American Rialto. As he climbed the ladder of financial achievement he held aloft at all times the flag of gratitude for the opportunities afforded him in the New World. He became a citizen of the United States and was elected a member of the Philadelphia "City Councils."

---

* This is the official judgment of the Supreme Court of Pennsylvania in this case.

In 1830, having reached that age when a good man contemplates how the shadow of his life may still be helpful to the living after he will have departed, he went into consultation with a scrivener, his conscience, his sense of appreciation and undying spirit of patriotism. From the conference emerged his last will and testament which, when probated in 1831, shone as a lyrical paean to Philadelphia which he loved with a devotion akin to that which Cincinnatus is reputed to have borne toward Rome. Girard revealed through this last writing that he could not do too much for the City which had been a foster mother to him. He left her funds with which to lay out new streets, pave and widen others, remove wooden houses, cleanse the docks on the Delaware, and supply water for various sections of the City. He provided for a competent police force, a division of the City into "watch districts," and in general made available facilities to "improve the city property, and the general appearance of the city itself; and, in effect diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it."

The will of Julius Caesar, dramatically proclaimed to the populace by Marc Antony, which gave to every Roman citizen the sum of 75 drachmas* and to the general citizens the right to breathe fresh air in his "private arbours and orchards," was a rather niggardly posthumous gift in comparison to what Girard gave to Philadelphia.

Girard was generous to public charitable institutions as the Philadelphia Hospital, the Pennsylvania Institution for the Deaf and Dumb, the Orphan Asylum of Philadelphia, and various other organizations for relief of the poor and the distressed.

He bestowed a legacy on the public schools of Philadelphia. He bequeathed $300,000 to the Commonwealth of

* According to Everyman's Smaller Classical Dictionary by E. H. Blakeney and J. Warmington the modern equivalent of a drachma would be about 8 pence, so that the prodigal Caesar left to each Roman citizen approximately twelve dollars.

Pennsylvania for internal improvements by canal investigation. He left some modest sums to relatives, friends, and servants, but the mass of his estate was dedicated to the public welfare. Thus, he said: "And whereas, together with the object just adverted to, *I have sincerely at heart the welfare of the city of Philadelphia*, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior: Now, *I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind and wheresoever situate . . . unto the Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned and declared of and concerning the same.*"*

Of this residue in trust he allocated two million dollars for the establishment of a college for "poor white male orphans." This college later became known as the Girard College and is the subject of the instant litigation.

It is difficult to visualize the will of a private individual more dedicated to public business than Stephen Girard's. Schools, streets, docks, canals, river distribution, public hospitals and asylums are items which one finds in the budget of nations, states, and municipal corporations, not private householders. These are matters for the consideration of the State and indeed the State of Pennsylvania recognized that fact at once.

Only three months after Girard's death the General Assembly of Pennsylvania (on March 24, 1832, P. L. 176) enacted legislation directing the City of Philadelphia to carry into effect the will of Stephen Girard.

Two weeks later, (Apr. 4, 1832, P. L. 275) by statute, Pennsylvania authorized the City of Philadelphia to provide "for the election or appointment of such officers and agents

* Italics throught, mine, unless otherwise indicated.

as they deem essential to the due execution of the duties and trusts enjoined and created by the will of Stephen Girard."

On February 27, 1847, (P. L. 178), the Legislature passed a special Act making Philadelphia the guardian of the person and property of every child admitted to Girard College. The same Act authorized Philadelphia to bind out Girard College orphans to suitable occupations from the age of 14-18 to 21.

The college was opened on January 1, 1848, under the direct management, supervision, and authority of City Council. The City Council ran the college as authoritatively and completely as an engineer runs a locomotive. From March 21, 1833, until December 18, 1869, the City Council passed 48 ordinances dealing exclusively with Girard College. The ordinances covered such subjects as erection of buildings, the appointment of architects, purchase of construction materials, buying of books, desks, blackboards and other educational paraphernalia, appointment of committees to administer the college, the making and approving of contracts appertaining to the college in all its various phases of activities, the appointment of, and payment of salaries to principals, teachers, janitors, and other employees, organization of faculty and courses of instruction, employment of counsel, etc., etc.

The General Assembly of Pennsylvania at no time relinquished its control over Girard College and it never relaxed its concern to make of the enterprise an institution worthy of the State. On April 20, 1853, (P. L. 624), it passed an Act providing that "the mayor, aldermen and citizens of Philadelphia, or such persons as they shall direct and appoint, shall bind by indentures as apprentices, the orphan children in the Girard College for Orphans."

By 1869 it became evident to the State Legislature that the normal duties pressing upon a City Council in governing a large metropolitan city the size of Philadelphia were too many and onerous to allow for an active management, superintendency and operation of a college. Accordingly, on June 30, 1869 it passed an Act (P. L. 1276) creating the

Board of Directors of City Trustees to be composed of the Mayor of Philadelphia, the Presidents of Select and Common Councils and twelve other citizens to be appointed by the judges of the Court of Common Pleas of Philadelphia County. This Board, which came to be known as the Board of City Trusts, took over the direct and immediate management of Girard College. Under its direction and control the College flourished. The $2,000,000 originally bequeathed has now, through good business methods, as well as wise and careful investing, become $98,000,000, with an annual income of $2,000,000. The real property of the Girard estate is worth $10,000,000. Over Girard College hovered not a cloud of apprehension or fear for the future, until the Orphans' Court of Philadelphia entered an order which has brought about the lamentable state of affairs which is the subject of the present litigation.

On September 24, 1954, two Negro fatherless boys, William Ashe Foust and Robert Felder, aged 8 and 7 years respectively, applied for admission to Girard College on the basis that they qualified in every respect under existing law to meet entrance requirements. The Board of City Trusts rejected the applications, asserting that it had no power to admit "other than white boys to Girard College." The boys, as well as the City of Philadelphia and the Commonwealth of Pennsylvania, petitioned the Orphans' Court to order the admittance of the orphan applicants. The Orphans' Court dismissed the petitions. This Court on November 12, 1956, affirmed the action of the Orphans' Court, thus excluding Foust and Felder from Girard College. (386 Pa. 548).

On appeal thereto, the Supreme Court of the United States, on April 29, 1957, reversed the judgment of this Court, with the declaration that: "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amend-

ment. Brown v. Board of Education, 347 U. S. 483." It accordingly remanded the cause "for further proceedings not inconsistent with this opinion."

This Court, then, on June 28, 1957, vacated the decrees of the Orphans' Court excluding Foust and Felder and remanded the cause to the Orphans' Court "for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its said mandate."

On September 11, 1957, the Orphans' Court of Philadelphia County, without any hearing and without allowing Foust, Felder, the City of Philadelphia, or the Commonwealth of Pennsylvania, who are all party litigants, an opportunity to be heard in argument or otherwise, dismissed the petitions of Foust and Felder and ordered the removal of the Board of Directors of City Trusts. On October 4, 1957, the same Court appointed thirteen named persons as trustees of the Girard Estate on the assumption that, being private individuals, they would not be subject to the restrictions of the Fourteenth Amendment and could accordingly legally exclude Foust and Felder from the Girard College because they are Negroes.

I pass over without discussion the action of the Orphans' Court in refusing the parties a hearing on so momentous a piece of litigation. To dwell on this manifest denial of due process of law would be to expatiate on the obvious, emphasize the glaring, and underline the italics of the horizon. But, putting aside the Court's palpable denial of the fundamental right of every litigant to be heard before a cause is adjudicated against him, I submit that there was ample reason for this Court to reverse the Orphans' Court because its errors in the disposition of this case have not been merely procedural, spasmodic, or minor; they have been constant, undeviating, and monumental.

In its opinion of September 11, 1957, the Orphans' Court said: "It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust,

nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to the trust and not the trust to the trustee."

But the Supreme Court did not say that the Board was disqualified or incompetent because it refused to admit Foust and Felder to Girard College. It only said that under the law of the land, the Board could not exclude these children. No one charged the Board with misconduct, no one complained that its management of the Stephen Girard was not exemplary, no one moved for dismissal of the Board. The Act of June 30, 1869, which brought the Board into existence has not been repealed or its powers minimized. By what authority may the Orphans' Court of Philadelphia County nullify an Act of the General Assembly?

Nor did the Supreme Court say that if the Board of City Trusts was removed as trustee, its successor could exclude Negroes from Girard College.

The fact of the matter is that no trustee, no matter how appointed, may practice in the Girard College a discrimination which is forbidden by the Fourteenth Amendment. The Girard College, because of the nature of its origin, its legislative history, its councilmanic management, its municipal control and subservience to governmental supervision is as much a public institution as the University of Pennsylvania and is, therefore, bound by the decision of the Supreme Court of the United States in *Brown v. Board of Education*, 347 U. S. 483.

It is no answer to this statement to say that the Girard College had its genesis in private funds. The Commonwealth of Pennsylvania was once a private grant and the Island of Manhattan once belonged to a private tribe of Indians.* Land and institutions may become public through purchase, through dedication, and through use. Girard College is public because Girard so planted it and because its whole

* The City Solicitor of Philadelphia well says in his excellent brief that: "The private property owned by Girard at the time of his death no longer exists, except in a highly mystical sense."

growth has been accomplished in the orchard of governmental care.

A reading of the will should be enough in itself to convince the mind that Girard brought into play every possible trumpet of the English language to proclaim that his whole fortune was to be devoted to the public welfare irrevocably. With the exception of a few small bequests, long ago satisfied, Girard's entire estate is now in the hands of the City of Philadelphia. In the case of *Soohan v. City of Philadelphia*, 33 Pa. 21, 28, this Court said: "This sacred trust was confided by Stephen Girard to the mayor, aldermen, and citizens of Philadelphia, who, by legislative enactment, have been succeeded by the City of Philadelphia . . . The directors of the Girard College are the creatures of an ordinance and *are merely the agents of the real trustee, the city.*"

Girard was so determined to prevent his estate from falling into the classification of a private institution that he declared that if the City of Philadelphia failed to carry out the provisions of his will, his estate would pass to the Commonwealth of Pennsylvania, and if the State violated his wishes, the United States would become the final beneficiary. It is not evident, then, that the action of the Orphans' Court, in turning the Girard estate over to private individuals, strikes at the very jugular vein of Girard's expressed intentions?

As a matter of law, the Orphans' Court cannot give away Girard College any more than it can give away a public park or City Hall.

The Supreme Court of the United States in its Opinion on April 29, 1957, said: "The will named as trustee the City of Philadelphia. The provisions of the will were carried out by *the State and City* and the college was opened in 1848."

If litigation had arisen over some college action performed in 1848, there could be no doubt, under this language of the Supreme Court, that, as of 1848, Girard Col-

lege would be accepted as a public institution. How much more must it be a public institution today when we realize that since 1848 the City of Philadelphia and the Commonwealth have exercised unceasing jurisdiction over Girard College?

By law and by provisions of the Girard will, the status of Girard College has been one of constant State and municipal responsibility, The launching of Girard College and its administration over the decades have brought into play governmental police powers and rights of eminent domain which could not possibly be exercised by private trustees. Members of the Legislature visit and inspect Girard College; its accounts must be open at all times to State inspection; the City of Philadelphia is required to submit reports on the College to the Legislature. The Treasurer of the City of Philadelphia handles the funds of the Girard Estate. The City Controller audits its accounts. The City is guardian of the persons and estates of the students. In the latter capacity it holds $2,940,716.16 in property.*

The principal body involved here is not the Board of City Trusts as such, but the City of Philadelphia itself. The City is not merely a trustee. It acts for the inhabitants of Philadelphia. It is a beneficiary of the trust. The Act of June 30, 1869, creating the Board of City Trusts, provides: "The duties, rights and powers of the City of Philadelphia, concerning all property . . . dedicated to charitable uses or trusts, the charge or administration of which are now or shall hereafter become vested in . . . the city *shall be discharged by said city* through . . . a board composed of fifteen persons, *including the mayor of said city* . . . who shall exercise all the *duties and powers of said city* . . . concerning any such property appropriated to charitable uses . . . to the extent that the same have been or may hereafter be, by statute law or otherwise, vested in and delegated to the said city . . ."

In an interpretation of the Act of 1869, this Court

*87th Annual Report, Board of Directors of City Trusts, p. 12.

said in the case of *Wilson v. Bd. City Trusts*, 324 Pa. 545, 555: "We cannot disregard the fact that the Mayor is the duly elected executive of one of the beneficiaries, the City, and that he represents not only himself as an individual but to a certain extent the citizens of Philadelphia who constitute the beneficiaries of all the trusts."

For 126 years Girard College has been administered as a public institution by public officials in their public capacities for the benefit of the public. If everything of a governmental character imbedded in the very sinews and fibers of Girard College were to be removed, it would be like withdrawing from a modern office building its structural framework. Take away the steel beams and columns of the Empire State Building and it would collapse into a mass of stone, bricks, mortar, glass and debris. Take away the governmental backbone of Girard College and it will be a shapeless mass of indirection and purposelessness. The action of the Orphans' Court if unreversed, creates a condition which approaches the dignity of chaos. It opens a Pandora's box of dilemmas, namely:

1. The Board of City Trusts is required to report to the City Council, the State Legislature, and the Courts of Common Pleas. Will the new board report to the City Council, Legislature, and Court of Common Pleas? If it does, then will its action not be State action? If it does not, how can the Orphans' Court decree do away with a requirement of the State Legislature?

2. Since the City remains as guardian of the person and estate of Girard City students, will that guardianship not bring the City within the application of the Fourteenth Amendment since the City is a branch of sovereign government?

3. While estoppel cannot operate against a State, is it not clear in honor and justice that when the Legislature of Pennsylvania, by the Act of 1832, enacted legislation which confirmed the State's acceptance of $300,000 be-

queathed to it by Girard, it bound itself to a governmental management and supervision over the Girard Estate?

4. The Girard will left to the City the working out of details because the City Council is elected by the people. XXI, Sc. 9, 28a. But what opportunity will the people have to control the actions of private trustees?

5. The Girard funds were mingled with City funds. After more than a century of public management, is it possible to determine the accretion due to public management, and will that accretion be paid back?

6. The Act of 1847 provided that students who reached 18 years of age were to be bound out by the City of Philadelphia to suitable occupations until they reached the age of 21. Will the City continue to do this?

7. Does the appointment of private trustees to manage Girard College make the College a private school? And will it now pay the taxes which are assessed against all private schools?

8. Etc.

9. Etc.

In order to make of Girard College a private institution it would be necessary to repeal at least five Acts of the Pennsylvania General Assembly;* It would be necessary to nullify 48 Ordinances of the Philadelphia City Council; it would be necessary to strip the College of all the public maintenance, supervision, and operation it has had for 126 years. It would be necessary to pay back all salaries paid public officials who have worked in the maintenance and operation of Girard College. The Orphans' Court can brandish no legal wand with which it can wipe out 126 years of continuous governmental control and shrink the oak tree of the Girard College of today into the

* Each of these statutes is entitled "An Act Relative to Girard College," and none uses the phrase "white male orphans."

acorn left by Stephen Girard. It must always be kept in mind that when the buildings of Girard College were finally constructed the fund of $2,000,000 left by Girard was practically exhausted. It was the good business judgment exercised by the Philadelphia City Council and the equally wise administration, under State direction, demonstrated by the Board of City Trusts which revived the fund and finally brought it to its present opulent state of $98,000,000.

In this Opinion I am first directing my attention to the fallacies in the Orphans' Court's decisions so that we can better and more easily understand what I regard to be the errors of this Court which has affirmed the Orphans' Court action. The Orphans' Court ordered what is legally and physically impossible. Girard College is intrinsically, architecturally, and economically* a creature of the State. The Orphans' Court has no jurisdiction to remove the Board of City Trusts. Under the Act of 1869, members of the Board may be removed only by vote of two-thirds of membership of the Court of Common Pleas (made up of 21 judges) of Philadelphia County.

The Orphans' Court says in its opinion: "Our course has been clearly charted." The charting to which it refers is the statement made by the Majority of this Court in its decision of November 12, 1956 (386 Pa. 548, 566): "Even if the Board of Directors of City Trusts *were* deemed to be engaged in 'State action' in the administration of the Girard Trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the

* The funds of the College and those of the City have been so intermingled that the City Council used income from the Girard Estate for municipal purposes other than the College, amounting to $571,958.42, in the years 1833 to 1848 inclusive. (Report of Hon. George Wharton Pepper, Auditor).

charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee." (Emphasis in original).

This advice on the part of the Majority of this Court, I must say with all respect, was not a very wise one. Instead of following the channel marked by the Constitution, the advice indicated that a Northwest Passage might be found which would permit the Orphans' Court to reach a land where it had no right to be at all. Considering the public nature of Girard College there is no way for any administrator of that institution to avoid the Fourteenth Amendment.

On October 14, 1957, the Orphans' Court denied the petions of Foust and Felder, of the City of Philadelphia, and of the Commonwealth of Pennsylvania, for reconsideration and vacation of its decree entered September 11, 1957 (the one dismissing the petitions of the applicants and removing the Board). In denying the petitions the Court said: "We are of one mind that the Supreme Court of Pennsylvania in its opinion filed in this case on November 12, 1956, (386 Pa. 548) squarely ruled upon all of these issues. We are bound by that decision. Our decree of September 11, 1957, is in conformity therewith."

Before such a statement, one can only stand in awe. What the Orphans' Court overlooks, and it is a strange oversight indeed, is that the decision of this Court from which the above quotation was taken, was reversed by the Supreme Court of the United States! And when a decision is reversed it is like the Andrea Doria at the bottom of the sea. It sinks in its entirety, not only in part. Rudder, bridge, hull, superstructure, compass, and quadrant all go. Thus, it is futile for the Orphans' Court to say that it is charting its course by compass and quadrant which are rusting in the submarine cemetery of law which is no more.

The action of the Orphans' Court in dismissing the Board of City Trusts and appointing thirteen so-called private trustees to operate the Girard Estate was more than an act of dubious legality. It was one of manifest illegality. By a stroke of the pen the Orphans' Court, if its action is not reversed, siphons $98,000,000 from the Treasury of the City of Philadelphia into the depositary of thirteen private individuals without compensation to the City, it reads into the will of Stephen Girard language which is not there, it passes over language which *is* there, it nullifies State statutes and City ordinances, it loses sight of a Constitutional amendment and misreads the plain wording of the mandate of the Supreme Court. However, it is interesting to observe that the Orphans' Court is not too certain, in spite of its assertion that its course was "clearly charted", that it is entirely confident that the course it selected actually conducts to the port it is seeking. In appointing thirteen private trustees, it chose six of them from the Board of City Trusts which it had already declared as disqualified and incompetent! It could not have believed that the Board was entirely disqualified and incompetent when it accepted almost 50% of the Board's membership to participate in the so-called private trusteeship. And it is well to observe, as pointed out by counsel for the City of Philadelphia, that: "These six constituted a majority of the living appointed members of the Board of Directors of City Trusts and included five of the eight members of the executive committee of the Board."

Does pinning a badge of private trustee on six heretofore declared public trustees remove the so-called incompetency of which the Orphans' Court speaks? It is interesting to note also that although, according to the Orphans' Court, the Board of City Trusts has been disbanded, it appears in this appellate litigation as an appellee, thus being triumphant at its own supposed funeral.

It is enigmatic to me why this Court sent the case back to the Orphans' Court after the Supreme Court stated quite

clearly what its decision was. This Court had decided that Foust and Felder should not be admitted to Girard College. The Supreme Court reversed that decision. What else could have been meant than that Foust and Felder were now to be admitted? The Majority Opinion makes a point of the language used by the Supreme Court in its order remanding the cause for "further proceedings not inconsistent with this opinion." What proceedings would there be other than admitting Foust and Felder to Girard College? There was nothing else pending. The admittance or rejection of the applicants was the only issue in the entire litigation. In support of its position of exclusion the Majority cites the case of *Sweatt v. Painter*, 339 U. S. 629. The Supreme Court there held that the "Fourteenth Amendment required that the applicant be admitted to the University of Texas Law School." It also used the language embodied in the case at bar, namely, "The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion." In the case at bar the applicants are minors. There are certain preliminaries which must be attended to before they may be admitted, even following a decision which would admit them on the ground that the Girard College is a public institution: there must be certain releases from relatives, the City must become the guardian, indenturing must be considered. "Further proceedings" obviously refers to the entire operation required to get Foust and Felder into Girard College, which certainly an appellate court would not spell out in detail.

I will now address myself more particularly to the Majority Opinion of this Court which affirms in toto the action of the Orphans' Court. At the outset I will say that several of the cases cited by the Majority support the position of the appellants rather than the appellees. For instance, in *Vidal et al. v. Girard's Excutors*, 43 U. S. 126, the Supreme Court held that the *City of Philadelphia* was legally capable of executing the Girard trust. In *Girard v. Philadelphia*, 74 U. S. 1, the question again arose as to

whether the City of Philadelphia, after the consolidation Act of 1854, could still function as trustee of the Girard estate. The Supreme Court held that it could and should so function.

The Majority cites *Holdship v. Patterson*, 7 Watts 547, 511, where Chief Justice Gibson said that a testator "has an individual right of property in the execution of the trust, and to deprive him of it would be a fraud on his generosity."

This is like quoting the Ten Commandments or reassuring the world that honesty is the best policy. The quotation asserts an immutable principle in the law, but its application in the *Holdship* case bears no logical relationship to what is involved in the case at bar, as will be observed from the syllabus of the case which succinctly states: "A benefactor may provide for a friend the means of subsistence for himself and family, without exposing his bounty to the debts or improvidence of the beneficiary. He has an individual right of property in the execution of the trust, of which he cannot be deprived by an execution against the trustee."

The Majority quotes the aphorism that "the trustee must be fitted to the trust and not the trust to the trustee." But, like many aphorisms, this also has its counterpart, and that counterpart is to be found in Section 397 of the Restatement, Trusts, namely, "If the settlor manifests an intention that the intended charitable trust shall not arise or shall not continue *unless the person named by him acts as trustee*, the intended charitable trust fails unless the person named by him as trustee acts as trustee." *

Nothing could be clearer in Girard's will than that he intended the City of Philadelphia to be the trustee of his estate. In fact, as already indicated, the failure of the City

* If the administration of a laboratory for medical research is assigned to a physician, the substitution of a shoemaker might well wreck the institution and in such case it would be better that the trust fail than that the health and life of patients should be jeopardized.

to qualify would bring about a termination of the trust, and the passing over to the remainderman, the Commonwealth of Pennsylvania.

The Majority Opinion says that: "It is not possible to read Girard's will without being deeply impressed with the fact that it was *the college, as a private charity*, and *not the trusteeship of the city*, that was the primary object of the donor's testamentary scheme." (Italics in original)

This, of course, is like saying that one is more interested in the maintenance and operation of an office building than he is in the architect who is to build it. But he cannot have a building without the architect. Girard could not have a college without a trustee, and he specified that the trustee should be the City of Philadelphia. The City was the horse and the college the carriage. Without the horse the carriage could go nowhere.

The Majority admits that the trustee "was a necessary and unavoidable incident of the trust," and thus the testator availed himself of the services of the City. The Majority errs, however, when it says that in selecting the City, Girard "availed himself of the services of the only existing local corporate body capable of administering the trust in perpetuity."

The Majority of this Court* uttered this same inaccuracy in its Opinion in the *Girard Will Case*, 386 Pa. 548. Its repetition does not improve its standing in the realm of facts and realities. The fact of the matter is that continuous trustees were not rare in 1830. An advertisement in the New York Evening Post, August 6, 1822, proclaimed: "The public will readily perceive, that the advantages of this company to *protect property* for the benefit of *infants* or *others*, are far greater than those of individual executors or other trustees, who are always liable to casualties . . . By placing such property in the charge of this company *who have continued succession*, there can be

* The membership is slightly changed since 1956.

no danger whatever of any such casualties." ** (Italics in original)

When Girard wrote his will there were many corporate fiduciaries to handle trusts in perpetuity.*** Girard could also have provided for a self-perpetuating board of trustees if he had chosen to do so. The Dartmouth College charter provided for such a board.****

In stating that Girard chose the City of Philadelphia as trustee only because of its perpetual existence, the Majority speculates. But why speculate, when it is so evident why Girard made his particular selection? Girard wanted the City of Philadelphia to run the College because the City government was made up of representatives of the people. Girard knew that with public operation, the College would be continually bathed in the spotlight of popular interest so that if any part of the citadel began to fall, because of incompetent management or corruption, the people could at the polls oust the bunglers or malefactors. Is this statement merely a deduction from the evidence in the case? Is it a conclusion drawn only from the history of the institution and the litigation which has gone with it? It is not. As respectable as such an argument would be, we do not depend alone upon history, logic, and reasonableness of view. We find Girard's specific intention expressed in the parchment of his last will and testament, namely, "In relation to the organization of the college and its appendages, I leave, necessarily many details to the Mayor, Aldermen and Citizens of Philadelphia and their successors; and I do, so with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia *will observe and evince special care*

** I apologize for this item, taken from my Dissenting Opinion in the *Girard Will Case*, supra. but since the Majority repeated what it said in that case, on this subject, I had no recourse but to go to the same cupboard for the antidote.

*** Smith. Development of Trust Companies in the United States.

**** *Trustees of Dartmouth College v. Woodward*, 17 U. S. 518.

and anxiety in selecting members for their City Councils and other agents." (Art. XXI, Sec. 9)

If language of this specificity can be ignored, then fogs of confusion have enveloped the dictionary, and mists of ambiguity have made written communication of thought a snare and a delusion. Girard had but one underlying purpose in the disposition of his secular riches, and that was to benefit Philadelphia, that is, its people, and it certainly was not illogical thinking on his part to conclude that the best sentinels to stand guard over his bequeathed treasures were the representatives of those who would enjoy his largess.

The Majority even goes so far as to say, quoting from the Majority Opinion in the *Girard Will Case*, 386 Pa. 548; that the Girard College is not a school at all, but "a home where the fatherless boys eat, sleep, study and live together." If we omit the word "fatherless," how does that language differ from a description of any other male college? Is not the Lafayette College in Easton a home where boys eat, sleep, study and live together? Is that also not true of LaSalle College in Philadelphia, and Haverford Colleg in Haverford, and Kings College in Wilkes-Barre? Girard College differs from these named colleges only in that the Girard students do not pay for tuition or maintenance, but, then, students do not pay for tuition or maintenance at the Naval Academy at Annapolis or the Military Academy at West Point, so that payment or nonpayment is not the criterion by which one determines whether an institution is a school or not.

The Majority Opinion says that: "Not a penny of State or city money has ever gone into it [Girard College]; no taxpayer has even been called upon to contribute to it." This argument was used in the *Girard Will Case* in 1956 by the then Majority of this Court. It was shown then to be without substantiation, but it is here being repeated and served again, but with no more flavor of plausibility then attended its original appearance on the platter of consideration. How can the Majority ignore that the State and the

City have spent "not a penny" but countless tens and perhaps hundreds of thousands of dollars in making Girard College the institution it is today? Who can calculate the cost to the State of the printing, clerk hire, and secretarial service which went into the actions of the General Assembly in holding hearing, conducting investigations, drafting bills and enacting them into law? Who knows how much it cost the City of Philadelphia for the investigations and hearings attendant on the 48 ordinances passed by the Council of Philadelphia with regard to Girard College? How much of government money was spent in salaries for State and City officials who gave of their official time in behalf of Girard College? Who can calculate how much it cost the City of Philadelphia and the General Assembly prior to 1869 to organize and actually operate the College? Who knows how much it cost for all the special visitations, for the audits, for the inspections and examinations conducted by the State of Pensylvania and the City of Philadelphia in behalf of Girard College? Who knows what it cost the City to work out the investments which have increased the capital of Girard College from $2,000,000 to $98,000,000?*

The Majority says that "The Supreme Court did not say that there is any Constitutional or other legal barrier to the removal of the Board of City Trusts as trustee of Girard College in order that the orphanage can be administered in accordance with all of the testator's express directions including the qualifications for admission to the student body." The Supreme Court did not say that there could be a legal barrier to the removal of the Board of City Trusts because there was no necessity to say that. It decided only the issue before it. There certainly would have been no point in saying what this Court should do with

* I apologize again for repeating what I said in my Dissenting Opinion in *The Girard Will Case*, but that statement is as true today as it was in 1956, just as the Majority's statement is as unveritable today as it was in 1956.

regard to the Board of City Trusts, and certainly there would have been no point in referring to other persons who *might* be brought forward as potential trustees.

The Majority Opinion says that some of the legislative enactments in behalf of the Girard Estate were "purely administrative neither envisioned nor required by Girard's will," but if there can be a difference of opinion on this point, there should be none on the point that that legislation was the pulmotor to the Girard estate which, had it not been for the direction, supervision, and expert business management given by legislatively created agencies, would have perished.

The Majority says that what Chief Justice Lowrie said in the case of *Philadelphia v. Girard's Heirs*, 45 Pa. 6, 25, is "peculiarly apposite here." Chief Justice LOWRIE said in that case, as quoted by the Majority: "In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that are intended for adaptation to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency." This language may be, as the Majority says, very apposite, but it is not very clear. However, even if we were to gather from the above quotation what Chief Justice LOWRIE had in mind, we still do not see how what he said in 1863 can overrule what the Supreme Court of the United States said in 1957.

The Majority says that "on the basis of the compelling testamentary evidence . . . Girard college is a private

charity capable of being lawfully administered by private trustees." But as I stated before, how can this Court or the Orphans' Court remove the City as trustee when the *will* makes the City the trustee? Of course, if the City were incapable, incompetent, or unwilling to act as trustee, the Orphans' Court might then, under the rule that a trust will not fail for want of a trustee, appoint another trustee. But the City *is* capable, it *is* competent, it *is* willing to act as trustee. *Why then should it be removed when the removal runs counter to the wishes of the testator?* The provision in the Girard will that the college be limited to male white orphans is no stronger a provision than that the City should administer and care for the estate. The City of Philadelphia is the tabernacle of the Girard Estate, it is the ark of the covenant. The whole history of the legislation, maintenance, direction of Girard College and the litigation over the estate is permeated with Philadelphia. Girard College is as much a part of Philadelphia as Benjamin Franklin is indelibly a part of Philadelphia's history.

This Court has heretofore looked with a rather critical eye on the business of the removal of a trustee. In *Mathue's Estate*, 322 Pa. 358, Chief Justice KEPHART said: "The removal of a trustee is a drastic action, which should only be taken when the estate is actually endangered and intervention is necessary to save trust property."

In *Hartman's Estate*, 331 Pa. 422, 428, we said: "Where there is no loss to any of the parties in interest, courts are reluctant to remove fiduciaries appointed by will."

United States Circuit Court Judge RIDDICK said in the case of *Sternberg et al. v. St. Louis Union Trust Co.*, 163 F. 2nd 714, 719 (certiorari denied 68 S. Ct. 267): "A trustee appointed by will or deed may not be removed by the courts unless there appears a clear necessity for the removal to save the trust property."

Certainly there is no such necessity here.

It could never have been Girard's intention that, with

an amendment to the United States Constitution, all his plans should go awry. He could never have intended that when the United States Constitution went in one direction, his college should go in another. He was interested in founding a college for poor male children. He said "white male orphans" because the times and the law would not have permitted a collective school for free children and slave children. That was the whole sum and substance of his statement. The language of the whole will demonstrates this, Girard's whole life proves it.

Even if we were to assume arguendo that by substitution of trustees Girard College would become a private trust, the question would still remain: Is the substitution of trustees legally proper? The Majority says that the substitution of trustees is necessary in order to carry out Girard's primary intent. The Majority reasons itself into assuming that Girard's primary intent was to exclude Negroes from Girard College. But such an assumption is to attribute to Girard an intent which is not only contradictory to Girard's history of dedication to the furtherance and betterment of the welfare of the people but it is in opposition to the terms of his will. The Majority quotes from Girard's will—"only after providing for the College as hereinbefore directed as my *primary object*," the Majority emphasizing the words "primary object." Girard's primary object, true, was the establishment and maintenance of the college but his primary object was not to exclude Negro orphans from that college.

What would Girard say today if he could be asked whether he desired that a private trustee administer the College? Would he answer that he wishes Negroes to be excluded and thus lose all the benefits of a govrnment-administered trust, or would he say that the City of Philadelphia, though it may no longer bar Negroes because of the Fourteenth Amendment of the United States Constitution, should continue the administration with all the benefits attendant upon public administration? To strip from Girard

College all the advantages of governmental administration such as tax exemptions, guaranteed investments, municipal supervision, State protection, publicly audited accounts, etc., only so that Negroes may be excluded from Girard College, is not to carry out Girard's primary purpose, but to defeat it! In view of the almost nonexistent rights of Negroes at the time Girard wrote his will, it is in accordance with history, with law, and established facts, to conclude that Girard's failure to include them as specified beneficiaries of his bounty was merely the result of his passive acceptance of conditions as they then existed. In any event, his failure to include Negroes does not evidence a primary intent that if they cannot be excluded by the City as trustee then Girard College must lose all the benefits which Girard expressly and specifically sought by providing for a governmental trustee.

The Majority devotes a page to the powers of the Orphans' Court of Philadelphia. No one questions its powers. What is questioned is the use of its powers in this case. The Majority says that the Fiduciaries Act of 1949 confers authority on the Orphans' Court to remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." But where is the proof in this case that the interests of the Girard Estate are likely to be jeopardized by the continuance in office of the Board of City Trusts, which has been a guardian angel to the Girard Estate and a ministering angel to the Girard College?

The Majority quotes from *Stevens's Estate*, 200 Pa. 318, which speaks of the power of Chancery, to remove a trustee who lacks power to execute a trust. Again, we agree on the law, but again I must say that the Majority-cited law has no application to this case. It is not contended here at all that the Board of City Trusts lacks power in executing the trust.

The Majority says that when a charity is established, "such a slight impediment as a defect or want of power in

the trustee to execute it does not stand in the way; the charity remains; the trustee is declared incapable of acting, and a competent trustee is appointed in his place." But there is no adjudication that the Board of City Trusts labors under any want of capacity or power to administer the Girard College in accordance with the nature and purpose of the Girard will. The Supreme Court of the United States held that under the present state of the law the Board of City Trusts may not exclude Foust and Felder from Girard College. As I have already indicated, it did not say that the trustee was incapable. It did not say that the trustee should be removed. It said that the machinery running Girard College was governmental. It did not suggest that the machinery should or even could be removed. It recognized a fact, namely, that Girard College is a public institution and that, therefore, this Court should initiate such proceedings as would be necessary to put its decision into effect. This could only mean that, once the necessary preliminaries were attended to, Foust and Felder were to be admitted to Girard College.

The Majority Opinion states in the way of a concession that "A State agency, even when acting as the trustee of a private charity, can have *no* part in the enforcement of a racially discriminatory restriction." (Emphasis in original). This is not the core of the case. As I have already discussed, the real questions are whether or not a private trustee may or should be substituted for the Board of City Trusts, and if such substitution of trustees would make Girard College a private institution so as to take its administration out of the reach of the Fourteenth Amendment. I believe that negative answers to such questions are as inevitable as the daily sunrise.

Furthermore the Majority overlooks one of the most vital provisions of the will, and to which I have already adverted, namely: "But, if the said city hall shall knowingly and wilfully *violate any of the conditions hereinabove and hereinafter mentioned, then I give and bequeath the said*

remainder and accumulations to the Commonwealth of Pennsylvania, excepting however the rents, issues and profits of my real estate in the City and County of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid College, in the manner specified in the last paragraph of the XXIst clause of this will." If the Orphans' Court felt that the City knowingly and wilfully violated Girard's will by pressing for admittance of Foust and Felder into Girard College, it could only declare a termination of the trust under the above-quoted terms of the will, since Girard had already provided for an alternative gift upon failure of the specifically named trustee to administer the estate. The Majority overlooks our statute of April 24, 1947, P.L. 100, §10, which reads: "Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impracticable of fulfilment, or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General of the Commonwealth, after proof of notice to the Attorney General of the Commonwealth when he is not the petitioner, order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intent be general or specific."

Public welfare would not approve of such a termination. Girard would be appalled at such a termination. Girard regarded the founding and the continued existence of Girard College so essentially a crystallization of his intention that he conditioned his very trust on it. The administration of the trust by the City of Philadelphia should therefore continue as heretofore, minus the unconstitutional requirement.

A dissenting opinion that is earnestly written because

the writer is disheartened at what he sees to be a manifest violation of legal principles may extend itself into an inordinate length since he wants to answer every paragraph, sentence, and phrase which contributes to the palpable injustice. However, there must be an end somewhere and I know of no better citation with which to terminate this Opinion than the case of *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2nd 212, cert. denied, 326 U. S. 721, where the facts are sufficiently similar to the ones in the case at bar as to make the reasoning therein unanswerable by the Majority in this case. Enoch Pratt of Baltimore gave to that City a library with certain conditions which were met by the Maryland Legislature and the Baltimore City Council. Funds were subsequently contributed to the institution by Andrew Carnegie. After the library had been operating some time, a Negro girl applied for admission as a trainee in the institution. The application was rejected and she appealed to the Courts, claiming that equal protection of the laws had been denied her. The United States Circuit Court of Appeals (Fourth District) upheld her contention. Chief Judge SOPER, speaking for the Court, said:

"*The donor could have formed a private corporation* under the general permissive statutes of Maryland with power both to own the property and to manage the business of the Library independent of the State. *He chose instead to seek the aid of the state to found a public institution* to be owned and supported by the city but to be operated by a self-perpetuating board of trustees to safeguard it from political manipulation; and this was accomplished by special act of the legislature with the result that the powers and obligations of the city and trustees were not conferred by Mr. Pratt but by the state at the very inception of the enterprise . . . . *It is our view that although Pratt furnished the inspiration and the funds initially, the authority of the state was invoked to create the institution* and to vest the power of ownership in one instrumentality and the power

of management in another, with the injunction upon the former to see to it that the latter faithfully performed its trust. We know of no reason why the state cannot create separate agencies to carry on its work in this manner, and *when it does so, they become subject to the constitutional restraints upon the state itself.*"

I would admit William Ashe Foust and Robert Felder to Girard College.

Appendix B

TEXT OF STATUTES INVOLVED

PENNNSYLVANIA ACT OF JUNE 30, 1869, P. L. 1276

A FURTHER SUPPLEMENT

To an Act, entitled "An Act to incorporate the City of Philadelphia, approved the second of February, one thousand eight hundred and fifty-four, creating a board called directors of city trusts."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That from and after the first day of July next, all and singular the duties, rights and powers of the City of Philadelphia, concerning all property and estate whatsoever, dedicated to charitable uses or trusts the charge or administration of which are now or shall hereafter become vested in or confided to the city of Philadelphia, shall be discharged by the said city through the instrumentality of a board composed of fifteen persons including the mayor of said city, the presidents of the select and common councils * for the time being, and twelve other citizens, appointed as hereinafter provided, to be called directors of city trusts, who shall exercise and discharge all the duties and powers of said city, however acquired, concerning any such property appropriated to charitable uses, as well as the control and management of the persons of any orphans or others, the objects of such charity, to the extent that the same have been or hereafter

* The Legislature, at its 1919 Session, amended the Charter of the City, providing for a single Councilmanic Chamber, reducing the Board to fourteen persons.

may be, by statute law or otherwise, vested in or delegated to the said city or the officers thereof.

SECTION 2. The judges of the supreme court, together with the judges of the district court and the court of common pleas of the city and county of Philadelphia, shall form a board of appointment,[1] of which the chief justice of the supreme court shall *ex officio* be president, which shall convene in the city of Philadelphia, at such time and place as the said chief justice shall appoint, within eight weeks from the passage of this act, and select and appoint, from the citizens of said city, twelve persons to serve, during good behavior, as members of the before-mentioned board of directors of city trusts, subject, however, to removal as hereinafter provided; vacancies in the number of said directors of trusts shall be filled from time to time by the said board of appointment; and any director of trusts may be removed from his office by the concurrent vote of two-thirds of the members of the board of appointment.

SECTION 3. Said directors of trusts shall meet every month, and as often as the business entrusted to them may require; a majority of the whole shall constitute a quorum for the transaction of business; at their first meeting after organization, and annually thereafter, they shall elect from their own number a president, who shall serve until the first day of the following year, and also a secretary, who shall be a salaried officer and not a member of the board, to serve for the same period; the treasurer of the City of Philadelphia shall be the treasurer of the said directors of trusts.

---

[1] By Article V, Section VI, of the Constitution of Pennsylvania, the jurisdiction and powers theretofore possessed by the District Courts and Courts of Common Pleas were vested in the Courts of Common Pleas.

Article V, Section XXI, of the Constitution of Pennsylvania, directs that the judges of the Supreme Court shall not exercise any power of appointment.

See Act of Assembly, page 10.

SECTION 4. The said directors of trusts shall have power to make rules and by-laws for the proper regulation of their business, to appoint as many agents as in their judgment shall be required for the proper discharge of all the duties delegated to said directors, and determine the duties and compensation of all such agents and appointees; also in the name of the said city, and in accordance with the conditions of said charitable trusts, to make all leases, contracts and agreements whatsoever, which, in the course of the administration and management of said property, it may from time to time become necessary and proper to make and execute; and it shall be the duty of the said directors of trusts, for and in the name of the said City to do, perform and discharge, all and singular, whatever acts and duties are or from time to time may become proper or necessary to be done by the said city in discharge of said trust, and to make an annual report thereof to the Councils of the City, to the board of appointment and to the Legislature of the state of Pennsylvania.

SECTION 5. It shall be the duty of the said directors of trusts, immediately after their organization, to provide a suitable place for the safe keeping of all the title papers, books of account, records and documents whatsoever of the said city, appertaining to the property, the care and management whereof, and the trusts and duties, the discharge whereof, for the said city, it is intended to devolve upon said directors of trust; and thereupon, on notice to the agents and employees of the city having such title papers, account books, records and documents in their charge, the same shall be delivered into the custody of the said board of trusts.

SECTION 6. The said directors, in the discharge of their duties, and within the scope of their powers aforesaid, shall be considered agents or officers of said city; but no compensation or emolument whatever shall be received for such services, nor shall any of them have or

acquire any personal interest in any lease or contract whatever, made by said city, through said directors, or through any agent or employee, whatever, appointed by them.

SECTION 7. That so much of any act of assembly as is hereby altered or supplied be and the same is hereby repealed.

PENNSYLVANIA ACT OF MARCH 24, 1832, P. L. 176 (1831-1832 volume)

AN ACT

To enable the Mayor, Aldermen, and Citizens of Philadelphia to carry into effect certain improvements; and execute certain trusts.

* * * * * * *

SECTION 10. *Be it further enacted by the authority aforesaid*, That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the City of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECTION 11. *And be it further enacted by the authority aforesaid*, That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the Trustees or Directors of said college, and approved of by a majority of the Select and Common Councils of the City of Philadelphia.

PENNSYLVANIA ACT OF APRIL 4, 1832, P. L. 275 (1831-1832 volume).

A SUPPLEMENT

To the Act entitled "An act to enable the mayor, aldermen and citizens of Philadelphia to carry into effect certain improvements and to execute certain trusts."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same:* That the Select and Common Council of the city of Philadelphia, shall be and they are hereby authorized to provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard.

PENNSYLVANIA ACT OF FEBRUARY 27, 1847, P. L. 178

AN ACT

Ralative to the Girard College for Orphans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonweatlh of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That the guardians for the relief and employment of the poor of the city of Philadelphia, the district of Southwark, and the townships of the Northern Liberties and Penn, be and they are hereby authorized, with the consent of the surviving mother, guardian, next friend, or by their own authority, if there be no such mother, guardian, or next friend of any poor white male orphan child within this Commonwealth, between the age of six and ten years, for whose admission to the Girard College for Orphans application shall have been made, to bind such orphan child by indenture, to the mayor, alder-

men and citizens of Philadelphia, as trustees under the will of Stephen Girard, deceased, as an orphan to be admitted into the said college, to be there maintained and educated according to the provisions, and in the manner and under all the regulations and restraints directed or contained in the said will, or as the said corporation of the mayor, aldermen and citizens of Philedelphia shall lawfully ordain, under the said will; which said indenture shall not express any term or time when the said binding shall expire; but such binding shall, nevertheless, expire at furthest, before the said Orphans shall attain the age of eighteen years, or at the pleasure of the said trustees at any time after he shall have arrived at between the ages of fourteen and eighteen years, or at any time before his attaining the said age of fourteen years, when the said orphan shall, by mal-conduct, cease to merit the benefits of the said college; and the said trustees shall duly declare the said fact, and such orphan child shall be bound to abide by and submit to such provisions, regulations, and restraints, as fully as if he were of full age, and consented thereto at the time of such binding, and shall be entitled to the benefits of the said college, according to the will of the testator; and the said parties shall be mutually entitled to relief for breach of duty by the other, in the same manner and by the same tribunals as is now provided by law, in regard to apprentices and their master or mistress, respectively.

SECTION 2. That it shall be lawful for the said mayor, aldermen and citizens of Philadelphia, and for such persons as they shall, by ordinance, authorize, appoint, and direct for this purpose, to bind, by indenture, any and every such orphan child who shall have remained in the said college until he shall arrive at between fourteen and eighteen years of age, and before his arrival at the age of eighteen years, to serve as an apprentice to any suitable person in this Commonwealth, in either of the occupations of agriculture, navigation, arts, mechanical trades or manufactures, ac-

cording to the will of the said testator; and such orphan child shall be bound to serve the time in his respective indenture contained, so as such time or term of years of such apprentice do expire at or before the age of twenty-one years, as fully, to all intents and purposes, as if he were of full age at the time of making such indenture; and the said indenture shall contain, and be deemed valid in containing such covenants and stipulations for the feeding, clothing and educating such orphan child as the said corporation, by ordinance, from time to time, shall direct. And in case the master of any such apprentice shall die before the expiration of such apprenticeship, it shall be lawful for the said corporation, or such persons as they shall authorize, appoint and direct, as aforesaid, again to bind such orphan child to such other person in this Commonwealth, as they shall approve, being of one of the occupations aforesaid, and so on from time to time, as often as such master shall die before such apprentice shall attain the age of twenty-one years, all which indentures shall be of the same effect and validity, and shall in all respects be as subject to the acts of assembly which now are or at the time shall be in force in this State, in regard to apprentices and their masters and mistresses, as if the said identure had been made in conformity to the said acts.

SECTION 3. The said corporation of the mayor, aldermen and citizens of Philadelphia, shall be the guardian of every such orphan child during the time that he shall remain in the said orphan college; and in case any such orphan child, at or before the time of such binding to the said corporation as an orphan, or during his remaining in such college, shall possess or become entitled to any effects or property, the said corporation shall be entitled, in like manner as other guardians, to demand and receive the same from any person having possession thereof, or owing the same, and to give acquittance therefor; and it shall be the duty of the said corporation, to take care of the same as guardian, and to make the same productive as far as

resonably can be, and to deliver and pay over the same with the increase, to the said orphan on his attaining the age of twenty-one years, or to his legal representatives if he shall die before attaining that age.

SECTION 4. That it shall be lawful for the said the mayor, aldermen and citizens of Philadelphia, to make application, at any time after such binding, to the judges of any court in the city and county of Philadelphia, having equity jurisdiction to cancel and annul the said identure, or other instrument of binding, so that the same shall be no longer binding upon the said corporation, as trustees of the said orphan college; and upon such application being made, and notice thereof being given to the overseers or guardians of the poor of the district in this Commonwealth in which such orphan had a settlement, at the time of his admission, or to the "guardians for the relief and employment of the poor of the city of Philadelphia, the district of Southwark, and the townships of Northern Liberties and Penn," if such orphan had no settlement in this State, at the time of his admission, and sufficient cause being shown to the satisfaction of the said court, it shall be lawful for the said court to decree and order that the said indenture shall be cancelled and annulled, either absolutely or upon such terms as the court shall see fit; and the same shall thereupon be cancelled and annulled accordingly, and the said orphan child, and the corporation aforesaid, and all other persons be respectively discharged therefrom.

PENNSYLVANIA ACT OF APRIL 20, 1853, P. L. 624

AN ACT

* * * *relative to the Girard College for Orphans.*

SECTION 6. That the mayor, aldermen and citizens of Philadelphia, or such persons as they shall by ordinance direct and appoint, shall bind by identure as apprentices,

the orphan children in the Girard College for Orphans, in the manner, and upon the terms and conditions mentioned and contained in the act entitled "An Act relative to the Girard College for Orphans," approved the twenty-seventh day of February, one thousand eight hundred and forty-seven, to suitable persons within this Commonwealth, in suitable occupations, such as agriculture, navigation, arts, mechanical trades, and manufactures, as mentioned in the will of the late Stephen Girard.

PENNSYLVANIA ACT OF MAY 23, 1887, P. L. 168

AN ACT

To authorize the binding of any orphan, to any city, to be made by mother, guardian or next friend.

SECTION 1. *Be it enacted, &c.*, That in all cases where by any law of this Commonwealth, the guardians for the relief and employment of the poor of any city, district or township, are authorized to bind any orphan to any city, the said binding may be made by the mother, guardian or next friend of the said orphan, and shall be of the same force and effect, and as binding upon the said orphans, as if the identure were executed by the guardians of the poor.

PENNSYLVANIA ACT OF APRIL 18, 1949, P. L. 512, 20 PURD. STAT. §320.331.

§320.331 GROUNDS FOR REMOVAL

The court shall have exclusive power to remove a personal representative when he—

(1) is wasting or mismanaging the estate, is or is likely to become insolvent, or has failed to perform any duty imposed by law; or,

(2) has been adjudged a lunatic, a habitual drunkard, or a weak-minded person; or,

(3) has become incompetent to discharge the duties of his office because of sickness or physical or mental incapacity and his incompetency is likely to continue to the injury of the estate; or,

(4) has removed from the Commonwealth or has ceased to have a known place of residence therein, without furnishing such security or additional security as the court shall direct; or,

(5) when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office.

(This section expressly is made applicable to trustees by §921 (20 PURD. STAT. §320.921) of the same Act.)

Appendix C

CITATIONS OF THE PRINCIPAL ORDINANCES OF THE CITY OF PHILADELPHIA RELATING TO THE GIRARD ESTATE AND GIRARD COLLEGE*

January 31, 1833 (p. 157) (management of the Girard Estate generally).

March 21, 1833 (p. 159) (provided for the erection of the College and named it "The Girard College for Orphans").

March 28, 1833 (p. 160) (supplemented Ordinance of March 21, 1833).

November 21, 1833 (p. 159) (management of the Girard Estate generally).

July 14, 1836 (p. 161) (provided for the purchase of books and equipment for the College).

July 26, 1837 (p. 161) (management of the College generally).

December 3, 1840 (p. 167) (management of the Girard Estate generally).

---

* The page citations in the case of ordinances adopted between the years 1833 and 1841, inclusive, refer to "Digest of Ordinances of City of Philadelphia and Acts of Assembly relating thereto", Crissy, 1841. In the case of ordinances adopted between the years 1847 and 1854, inclusive, the page citations are to "Digest of Acts of Assembly Relating to the City of Philadelphia and the (Late) Incorporated Districts of the County of Philadelphia and of the Ordinances of the said City and Districts", Duane, Hood and Myers, 1856. For the year 1855 and subsequent years, the citations are to the annual volume of ordinances.

January 28, 1841 (p. 162) (required all contracts entered into by the trustees to be approved by the City Councils).

March 11, 1841 (p. 167) (salaries fixed for officers of the Girard Estate and College).

June 3, 1841 (p. 168) (supplemented Ordinance of March 11, 1841).

February 27, 1847 (p. 242) (admission requirements for the College).

May 27, 1847 (p. 245) (provided for a Board of Directors to manage the College).

September 16, 1847 (p. 246) (provided for staff and faculty positions and fixed salaries).

November 9, 1848 (p. 249) (visitation committee of the City Councils established).

December 21, 1848 (p. 249) (supplemented Ordinance of May 27, 1847).

September 13, 1849 (p. 250) (care of property belonging to students at College).

January 10, 1850 (p. 251) (organization of faculty and courses of instruction).

January 16, 1851 (p. 252) (supplemented Ordinance of January 10, 1850).

December 2, 1852 (p. 252) (binding out of orphans).

April 20, 1853 (p. 250) (provided generally for the College).

July 7, 1853 (p. 254) (binding out of orphans).

April 27, 1854 (p. 254) (duties of the secretary of the College).

November 30, 1855 (p. 257) (appropriation for construction of buildings within the College).

June 25, 1856 (p. 172) (changes made in the supervision and management of the College).

March 9, 1860 (p. 110) (employment of counsel).

Juny 18, 1860 (p. 315) (management of Girard Estate generally).

December 22, 1860 (p. 447) (management of Girard Estate generally).

December 13, 1864 (p. 483). (authority to compromise suit with Girard's heirs).

June 29, 1868 (p. 277) (appointment of solicitor for the trustee of Girard's Estate).